Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

MARCIA ANN CROMLEY,

Petitioner,

v.

BOARD OF EDUCATION OF LOCKPORT TOWNSHIP HIGH SCHOOL DISTRICT 205, DONALD E. WEBER, RICHARD J. DITTLE, AND DONALD MEINTS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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80 pp

QUESTIONS PRESENTED

1. When, after two years of litigation, the plaintiff's lawyer accepts a partnership in the seven partner lawfirm representing the defendants, may a federal district court, consistent with the integrity of the judicial process and public confidence in the legal profession, permit the law firm to continue to represent the defendants on representations that the new partner will be shielded from involvement in the case?

2. Does a party seeking summary judgment have the burden of providing the district court with the evidentiary material which it believes demonstrate the absence of a genuine issue of material fact?

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No. 93-____

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MARCIA ANN CROMLEY,

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BOARD OF EDUCATION OF LOCKPORT TOWNSHIP HIGH SCHOOL DISTRICT 205, DONALD E. WEBER, RICHARD J. DITTLE, AND DONALD MEINTS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Marcia Ann Cromley respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on March 3, 1994.

OPINIONS BELOW

The decision of the Court of Appeals (App. 1-17) is reported at 17 F.3d 1059. The opinions of the district court (App. 19-48, App. 49, App. 50-58) are reported at 699 F.Supp. 1283 (N.D.Ill. 1988), 1990 WL 37198 (N.D. Ill. 1990), and 1993 WL 5394 (N.D.Ill. 1993).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254: The judgment of the court of appeals (App. 18) was entered on March 3, 1994.

STATEMENT

From 1978 to 1987, petitioner was the Reading Department chairperson and the "Chapter I Coordinator" at defendant school district. (Pet.App. 2.) In February of 1987, plaintiff informed the Illinois Department of Children and Family Services that two students at the school had complained to her of sexual misconduct by another teacher. (Pet.App. 2.)

On March 27, 1987, petitioner's position as chairperson of the reading department was abolished when the department was merged with the English department; thereafter, petitioner was not reappointed to the position of "Chapter I Coordinator." (Pet.App. 2-3.) Plaintiff was also passed over in filling several other vacant, supervisory positions. (Pet.App. 3.)

In November of 1987, petitioner brought this action under 42 U.S.C. §1983, alleging that her position as chairperson had been abolished in retaliation for her having complained about sexual misconduct. (Pet.App. 3.) Petitioner was represented by attorney Laurence L. Weiner. (Id.)

Respondents, represented by a partner in the firm of Scariano, Kula, Ellch & Himes, Chtd., moved to dismiss; in a memorandum opinion filed on November 1, 1988 (Pet.Appendix 19-48), the district judge permitted the core allegations of plaintiff's claims to proceed.

In early October of 1989, Weiner began to negotiate a partnership with the Scariano firm. Petitioner's attorney accepted a partnership with respondents' law firm on November 8, 1992. (Pet.App. 3.) On November 29, 1989,

the district judge permitted petitioner's counsel to withdraw.

After petitioner's attorney had changed sides, petitioner moved to disqualify the Scariano firm from continuing to represent the respondents. The Scariano firm responded with a memorandum and an affidavit (Pet.App. 59-65) describing the screening procedures that the Scariano firm had adopted on December 15, 1989. The district judge denied the motion to disqualify in a brief memorandum opinion dated March 19, 1990. (Pet.App. 49.)

After the case was ready for trial, respondents filed a motion for summary judgment. (Record Item No. 92.) Although defendants' motion referred to deposition excerpts, respondents did not file the depositions, instead supporting their motion with a single affidavit. (Record Item No. 93.) Plaintiff objected to many of respondents' claimed "uncontested facts" and the parties disagreed about what had been said at depositions. The district court granted summary judgment on the rationale that a trier of fact could not "reasonably conclude that but for the single call to DCFS, the merger decision would not have been made or that plaintiff would have been selected as English Department Chairperson or associate chairperson." (Pet.App. 57.)

Petitioner renewed her disqualification argument on appeal, urging the Seventh Circuit to adopt a *per se* rule of disqualification when, after two years of litigation, the plaintiff's attorney changes sides and becomes one of seven partners in the small law firm representing the defendants. The Court of Appeals, relying on its precedents upholding screening walls, concluded that disqualification of respondents' law firm had not been required. (Pet.App. 8-11.) The Court of Appeals rejected as "untenable" petitioner's argument that Rule 56 required the proponent of a motion for summary judgment to submit copies of depositions when there is a dispute about what had been said at the deposition (Pet.App. 11 n.4), and held that summary judgment had been

properly granted. (Pet.App. 12-17.)

REASONS FOR GRANTING THE WRIT

–I–

This case raises important questions involving the integrity of the judicial process and public confidence in the legal profession. At issue in this case is the applicability of a so called "Chinese Wall"[1] to a situation where, after two years of litigation, the plaintiff's attorney changes sides and becomes one of seven partners in the small law firm representing the defendants.

If this case had arisen in any of the numerous jurisdictions that have adopted the American Bar Association Model Rules of Professional Conduct, respondents' law firm would not have been permitted to choose between representing the plaintiff or the defendants after plaintiff's lawyer became a partner in the defendants' law form. As approved by the American Bar Association, Rule 1.10(b) of the Model Rules rejects "'any thought that the "taint" of the incoming lawyer can be cured by screening him or her out of the affected client's matter.'"[2] *Parker v. Volkswagenwerk*

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1. The term "Chinese Wall" has been criticized as "linguistic discrimination." *Peat, Marwick, Mitchell & Co v. Superior Court,* 200 Cal.App.3d 272, 293-94, 245 Cal.Rptr. 873, 887 (1988) (noting, *inter alia,* that "[t]he Great Wall of China on the other hand, was only a one-way. It was built to keep outsiders out—not to keep insiders in.")

2. Rule 1.10(b) of the Model Rules provides as follows:

> (b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are

Aktiengesellschaft, 245 Kan. 580, 589, 781 P.2d 1099, 1106 (1989), quoting 1 Hazard and Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct,* Rule 1.10, p. 191 (1988 Supp.) Under the Model Rules, the law firm would not have been permitted to choose between clients, but would have been compelled to withdraw from the litigation. See, e.g., *Picker International, Inc. v. Varian Associates, Inc.,* 869 F.2d 578, 593 (Fed.Cir. 1989); *Penn Mutual Life Insurance Company v. Cleveland Mall Associates,* 841 F.Supp. 815, 818 (E.D.Tenn. 1993).

The Seventh Circuit is the leading proponent of the minority view that screening walls permit a lawyer in private practice[3] to change sides in the middle of litigation. Starting with *Novo Terapeutisk, Etc. v. Baxter Travenol Lab.,* 607 F.2d 186 (7th Cir. 1979), and culminating in the present case, the Seventh Circuit has permitted the presumption of shared confidences among members of a law firm to be rebutted by a variety of "screening devices." See, e.g., *Schiessle v. Stephens,* 717 F.2d 417 (7th Cir. 1983) (attorney moving from one large law firm to another). A similar rule has been adopted by the Sixth Circuit. *Manning v. Waring, Cox, James, Sklar and Allen,* 849 F.2d 222, 225 (6th Cir. 1988).

The "screening device" approved by the Seventh Circuit in this case consisted of little more than an "admonishment" to each member of respondents' law firm not to discuss the

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materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to the matter.

3. Screening rules are recognized in the Model Rules of Professional Conduct (Rule 1.11(a)) when a lawyer leaves public service.

case with petitioner's former attorney. (Pet.App. 63-65.) A violation of this admonishment "could leave to consideration of discipline by the [firm's] executive committee." (Pet.App. 65.) The "screening device" did not contain any provision to bar petitioner's former attorney from sharing in the fees paid to the law firm by respondents.[4] The "screening device" approved by the Seventh Circuit in this case is, in the words of Professor Wolfram, "little but the self-serving assurance of the screening-lawyer foxes that they will carefully guard the screened-lawyer chickens." Wolfram, *Modern Legal Ethics*, p. 402 (1986).

Other courts have acknowledged the inadequacy of the "screening device" approved by the Court of Appeals in this case. "Resort to affidavits stating that 'I didn't look at the file' or asserting the existence of Chinese walls are of little consolation to that client and do little or nothing to erase the appearance of impropriety." *Nebraska ex rel. Firstier Bank*, 244 Neb. 36, 45, 503 N.W.2d 838, 844 (1993). The majority view is that a "cone of silence" is simply not enough to "safeguard against inadvertent disclosures" among members of a small lawfirm. *Baird v. Hilton Hotel Corporation*, 771 F.Supp. 24, 27 (E.D.N.Y. 1991) See, e.g., *Cheng v. GAF Corp.*, 631 F.2d 1052, 1057 (2d Cir. 1980), *vacated on other grounds*, 450 U.S. 903 (1981), *opinion following remand*, 713 F.2d 886, 891 (2d Cir. 1983), *vacated on other grounds*, 472 U.S. 1023 (1985); *Occidental Chemical Corporation v. Nueces County*, (Texas Court of Appeals, May 26, 1994), 1994 WL 209482 *2, *Smart Industries Corp v. Superior Court*, (Arizona Court of Appeals, April 7, 1994), 1994 WL 113385 *10 (explicitly rejecting Seventh Circuit's view);

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4. The contrary statement of the Seventh Circuit (Pet.App. 9) is unsupported by the record.

This Court should exercise its supervisory powers to prevent the clear perception of impropriety when, after two years of litigation, the plaintiff's lawyer jumps ship to become a parter in the small lawfirm representing the defendants.

-II-

The decision of the Seventh Circuit in this case is flatly at odds with the rule set out by this Court in *Celotex Corp v. Catrett*, 477 U.S. 317 (1986), that "a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories on file, together with the affidavits, if any' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp v. Catrett*, 477 U.S. at 323 (1986).

Respondents relied on page references to depositions in their motion for summary judgment. Petitioner disagreed with many of the inferences that respondents were drawing from the deposition testimony.[5] Respondents did not, however, file any of the depositions.

In the view of the Seventh Circuit, the party seeking summary judgment is not required to submit evidentiary material to support the motion. (Pet.App. 11 n.4.) The plain language of Rule 56 is to the contrary.

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5. The disputes about the contents of depositions are set out in Plaintiff's Response to Defendants' "Statement of Uncontested Facts," filed as an exhibit to Record Item No. 101, paragraphs 2.04, 3.02, 3.05, 5.225, 5.25, 5.29, 5.35, 6.04, 6.06.

CONCLUSION

The petition for writ of certiorari should be granted.

June, 1994

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In the
United States Court of Appeals
For the Seventh Circuit

No. 93-1300

MARCELLA ANN CROMLEY,

Plaintiff-Appellant,

v.

BOARD OF EDUCATION OF LOCKPORT TOWNSHIP HIGH SCHOOL DISTRICT 205, DONALD E. WEBER, RICHARD J. DITTLE, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87 C 9767—**James B. Moran**, *Chief Judge.*

ARGUED SEPTEMBER 30, 1993—DECIDED MARCH 3, 1994

Before FAIRCHILD, COFFEY and RIPPLE, *Circuit Judges.*

RIPPLE, *Circuit Judge.* Marcella Ann Cromley, a high school teacher, brought an action under 42 U.S.C. § 1983. She claimed that she had been denied various administrative positions because she had exercised her right to free speech as guaranteed by the First Amendment and made applicable to the states by the Fourteenth Amendment. The district court granted summary judgment to the defendants Board of Education of Lockport Township High School District 205 and its superintendent, assistant superintendent, principal, and one teacher (the "defendants").

It also denied Ms. Cromley's motion to disqualify defendants' attorneys. She now appeals the judgment of the district court. For the reasons that follow, we affirm.

I

BACKGROUND

A. *The First Amendment Retaliation Claim*[1]

Ms. Cromley has been a high school reading instructor in the Lockport Township High School District 205 since 1974. She had served as the Chair of the Reading Department and "Chapter I Coordinator" from 1978 to 1987. In December 1986, two students complained to her of sexual misconduct by a male teacher in her department, Donald Meints. After Ms. Cromley informed her supervisor, principal Richard Dittle, he undertook an investigation. Interviews with the students and with Meints established that the allegations were basically true. The principal and other administrators decided that Meints should be reprimanded and warned. Although a written summary of the reprimand was placed in the District office file, no report was included in Meints' personnel file or sent to the Illinois Department of Children and Family Services ("DCFS").

However, on February 12, 1987, Ms. Cromley reported the incident to DCFS. Moreover, on March 4, 1987 Ms. Cromley, as Reading Department Chair, gave Meints a harsh written evaluation, in which she noted the students' allegations. Meints, in turn, sent an angry rebuttal to the plaintiff, principal, and union representative. On March 27, 1987, school officials notified Ms. Cromley that the Reading Department was being merged with the English Department and would be chaired by a teacher from the

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[1] The district court set forth the underlying facts in detail in its earlier memorandum and order denying a motion to dismiss. *Cromley v. Board of Educ. of Lockport Township High Sch. Dist. 205*, 699 F. Supp. 1283 (N.D. Ill. 1988). In this opinion, we present only the facts pertinent to the issues raised on appeal.

English Department. Ms. Cromley's later applications to serve as Chapter I Coordinator, Associate English Department Chair, and English Department Chair were denied. Until 1987 she had been praised and reappointed each year as Chair of the Reading Department; however, her principal's 1986-87 evaluation of her work reported personnel problems in the department and concerns over her effectiveness in the department. There was evidence, as well, of friction between Ms. Cromley and both the principal and the superintendent. In light of these clashes, the principal and assistant superintendent agreed that they could not recommend either Ms. Cromley or Mr. Meints for leadership positions.

Ms. Cromley filed suit on November 12, 1987 under 42 U.S.C. § 1983, against the Board of Education, the named administrators, and Donald Meints. The complaint alleged that the defendants had retaliated against her because she had complained to DCFS about the sexual misconduct of Meints, a complaint which she asserted was protected speech.

On November 8, 1989, after two years of pretrial litigation, Ms. Cromley's attorney, Larry Weiner, accepted a partnership in the law firm of Scariano, Kula, Ellch & Himes, Chtd., which was representing the defendants. The district court granted Mr. Weiner's oral motion to withdraw as Ms. Cromley's attorney on November 29, 1989, and, on December 15, 1989, Mr. Weiner formally became a partner. Ms. Cromley moved for the disqualification of the Scariano firm from representation of the defendants.

B. *District Court Decisions*

By Order of March 19, 1990, the district court denied Ms. Cromley's motion to disqualify defendants' attorneys on the ground that the "barriers erected between the attorney and his new law firm with respect to this case are sufficient to rebut the presumption of shared confidences." *Cromley v. Board of Educ. of Lockport Township High Sch. Dist. 205*, No. 87 C 9767, 1990 WL 37198 at *1 (N.D. Ill. March 20, 1990).

By Order of January 6, 1993, the district court granted defendants' motion for summary judgment. *Cromley v. Board of Educ.*, No. 87 C 9767, 1993 WL 5934 (N.D. Ill. Jan. 6, 1993). The court set forth the framework for analyzing a public employee's First Amendment right of free speech. It acknowledged that this analysis requires that, in order to be afforded First Amendment protection, the employee's speech must relate to a matter of public concern and the employee's right to speak out must outweigh the government's interest in promoting effective and efficient public service. *See Connick v. Myers*, 461 U.S. 138, 147-54 (1983). The court noted that, under this analysis, the parties did not dispute that Ms. Cromley's call to DCFS was protected speech. However, the court held that Ms. Cromley's written annual evaluation of Meints several weeks later was private communication that was not protected speech. With respect to this latter communication, the court reasoned that this critical evaluation, following Ms. Cromley's earlier complaints about Meints to the school administration and to DCFS (for which Meints had received an oral reprimand), was a persistent re-raising of a closed issue rather than protected speech pertaining to matters of public concern. It further noted that Ms. Cromley's supervisors could take into account the impact of that harsh evaluation on continuing relationships in the school when deciding whether to allow her to continue in a supervisory capacity.[2]

The district court then considered whether there was sufficient evidence for a trier of fact reasonably to conclude that the protected speech (Ms. Cromley's phone call to DCFS) was a substantial and motivating cause of the merger and of her failure to attain leadership positions. The court noted that the School Board's decision focused on Ms. Cromley's administrative rather than on her teach-

[2] The district court's characterization of the evaluation is not contested on appeal, and we therefore need not pass on the correctness of that holding.

ing abilities; the clear concern was the possible repercussion resulting from placing either Ms. Cromley or Meints in a supervisory position over the other. The district court concluded, therefore, that Ms. Cromley's protected speech had not been a substantial factor in the Board's decision. As an alternate holding, the district court held that, even if the protected speech had been a substantial factor, a trier of fact could not conclude reasonably that, "but for the single call to DCFS," there would have been no merger. Nor could it conclude reasonably that Ms. Cromley would have been selected as English Department Chair, Associate Chair, or Chapter I Coordinator. Accordingly, the district court granted summary judgment to all defendants.

II

ANALYSIS

Ms. Cromley submits on appeal that the district court erred in denying the disqualification of the Scariano law firm representing the defendants and in granting summary judgment to the defendants. We shall consider each issue in turn.

A. *Attorney Disqualification*

Our review of the district court's decision whether to disqualify an attorney is usually a deferential one: We shall reverse that determination only if the district court abused its discretion. *United States v. Smith*, 995 F.2d 662, 675 (7th Cir. 1993), *cert. denied*, 1993 WL 481727, 62 USLW 3452 (Jan. 10, 1994) (No. 93-6704); *Owen v. Wangerin*, 985 F.2d 312, 317 (7th Cir. 1993); *United States v. Defazio*, 899 F.2d 626, 629 (7th Cir. 1990). However, when all evidence is submitted in the form of affidavits, and when the district court does not hold an evidentiary hearing or make findings of fact to which we must defer, "district courts enjoy no particular advantage over appellate courts in their formulation of ethical norms." *Freeman v. Chicago*

Musical Instrument Co., 689 F.2d 715, 721 (7th Cir. 1982). After a complete review of the record, we conclude that the district court's decision to deny Ms. Cromley's motion to disqualify must be affirmed under either an abuse of discretion or de novo standard of review.

The approach taken by this circuit for determining whether an attorney should be disqualified is a three-step analysis.

> First, we must determine whether a substantial relationship exists between the subject matter of the prior and present representations. If we conclude a substantial relationship does exist, we must next ascertain whether the presumption of shared confidences with respect to the prior representation has been rebutted. If we conclude this presumption has not been rebutted, we must then determine whether the presumption of shared confidences has been rebutted with respect to the present representation. Failure to rebut this presumption would also make the disqualification proper.

Schiessle v. Stephens, 717 F.2d 417, 420 (7th Cir. 1983) (citing *LaSalle Nat'l Bank v. Lake County*, 703 F.2d 252, 255-56 (7th Cir. 1983)); *see also United States v. Goot*, 894 F.2d 231, 235 (7th Cir.), *cert. denied*, 498 U.S. 811 (1990); *Freeman*, 689 F.2d at 722; *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 225 (7th Cir. 1978).

The "substantial relationship" test is easily met in this case. It is undisputed that the subject matter under scrutiny both before and after Mr. Weiner changed law firms was the litigation brought by Ms. Cromley against the School Board. The only change made was attorney Weiner's shift from the firm of Schwartz & Freeman, the firm representing Ms. Cromley, to that of Scariano, Kula, Ellch & Himes, the firm representing the School Board. Because Mr. Weiner's representation of Ms. Cromley before he moved to the Scariano firm is substantially related to his new firm's relationship to the School Board, a "presumption of shared confidences" arises:

> Implicit in a finding of substantial relationship is a presumption that particular individuals in a law firm freely share their client's confidences with one another. . . . [However, i]n *Novo*, we recognized that the presumption that an attorney has knowledge of the confidences and secrets of his firm's clients is rebuttable.

Freeman, 689 F.2d at 722 (citing *Novo Terapeutisk Laboratorium v. Baxter Travenol Lab., Inc.*, 607 F.2d 186, 197 (7th Cir. 1979) (en banc)).

As a first step in deciding whether that presumption has been rebutted, "we must determine whether the attorney whose change of employment created the disqualification issue was actually privy to any confidential information his prior law firm received from the party now seeking disqualification of his present firm." *Id.*[3] The rebuttal can be established either by proof that "the attorney in question had no knowledge of the information, confidences and/or secrets related by the client in the prior representation," *see Schiessle*, 717 F.2d at 420 (citing *Freeman*, 689 F.2d at 723), or by proof that screening procedures were timely employed in the new law firm to prevent the disclosure of information and secrets, *see Goot*, 894 F.2d at 235 (citing *LaSalle Nat'l Bank*, 703 F.2d at 259). Uncontroverted affidavits are sufficient rebuttal evidence. *Freeman*, 689 F.2d at 723; *Novo*, 607 F.2d at 197.

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[3] In *Analytica, Inc. v. NPD Research Inc.*, 708 F.2d 1263 (7th Cir. 1983), this court held that the presumption of shared confidences was irrebuttable when an entire law firm changed sides. *Id.* at 1267. We acknowledged in *Analytica*, however, that a lawyer who changes jobs and moves to a firm retained by an adversary "can avoid disqualification by showing that effective measures were taken to prevent confidences from being received by whichever lawyers in the new firm are handling the new matter." *Id.* In the case now before us, one attorney changed employment from the firm representing the plaintiff to a firm representing the defendants. This circumstance falls within the exception recognized in *Analytica*; therefore our analysis does not conflict with that decision. *See Schiessle*, 717 F.2d at 420 n.2.

Because Mr. Weiner, Ms. Cromley's attorney for two years, clearly had confidential information from his client when he moved to the firm representing the defendant School Board, we must focus on whether the Scariano law firm that Mr. Weiner later joined has demonstrated that it had established an effective screening procedure to block the disclosure of Ms. Cromley's confidences within the "new" firm.

> [T]he presumption of shared confidences could be rebutted by demonstrating that "specific institutional mechanisms" (e.g., "Chinese Walls") had been implemented to effectively insulate against any flow of confidential information from the "infected" attorney to any other member of his present firm.

Schiessle, 717 F.2d at 421 (citing *LaSalle Nat'l Bank*, 703 F.2d at 259). The types of institutional mechanisms that have been determined to protect successfully the confidentiality of the attorney-client relationship include: (1) instructions, given to all members of the new firm, of the attorney's recusal and of the ban on exchange of information; (2) prohibited access to the files and other information on the case; (3) locked case files with keys distributed to a select few; (4) secret codes necessary to access pertinent information on electronic hardware; and (5) prohibited sharing in the fees derived from such litigation. *See Goot*, 894 F.2d at 235-36; *Schiessle*, 717 F.2d at 421; *LaSalle Nat'l Bank*, 703 F.2d at 259. Moreover, the screening devices must be employed "as soon as the 'disqualifying event occurred.' " *Goot*, 894 F.2d at 235 (quoting *LaSalle Nat'l Bank*, 703 F.2d at 259). Other factors have been considered helpful in determining whether adequate protection of the former client's confidences has been achieved: the size of the law firm, its structural divisions, the "screened" attorney's position in the firm, the likelihood of contact between the "screened" attorney and one representing another party, and the fact that a law firm's and lawyer's most valuable asset is "their reputations for honesty and integrity, along with competence." *Analytica*, 708 F.2d at 1276-77 (Coffey, J., dissenting); *see also Schiessle*, 717

F.2d at 421; *Freeman*, 689 F.2d at 723. In addition, the attorneys in question must have affirmed these screening devices under oath. *See Goot*, 894 F.2d at 235; *LaSalle Nat'l Bank*, 703 F.2d at 259. The district court must find that the internal safeguards applied indeed did shield effectively the "tainted attorney."

In this case, the defendants have rebutted the presumption of shared confidences by describing the timely establishment of a screening process. When Mr. Weiner joined the firm he was denied access to the relevant files, which were located in a different office, under the control of David Kula, the partner handling the case. Mr. Weiner and all employees of the firm were admonished not to discuss any aspect of the case, and all were subject to discipline. In addition, Mr. Weiner was not allowed to share in the fees derived from this case. The defendants also submitted the affidavit of David Kula, the attorney representing them. In that sworn statement Mr. Kula stated that, as soon as he was informed that his law firm was discussing with Mr. Weiner the possibility of Mr. Weiner's joining the law firm, he and Mr. Weiner "agreed that absolutely nothing of a substantive nature regarding the instant lawsuit would occur" until decisions were made and the clients were made aware of them. R.51, Aff. at 2. The affidavit describes the procedures that were put in effect from December 15, 1989, the date that Mr. Weiner joined the firm. Mr. Weiner's new office was in Scariano's downtown Chicago building, and Mr. Kula's office was located in the firm's Chicago Heights office; each came to the other office only for specific business. Mr. Kula maintained the files for this case in his private office. When it implemented specific screening procedures, the firm required all members and employees of the firm to read and sign the memorandum describing the internal rules. R.51, Ex. A (Memorandum) and Ex. B (checklist of all employees of firm). Mr. Kula affirmed that "all of the admonitions of the screening memo have been adhered to by all attorneys and all support staff employed by this firm." We conclude, as did the district court, that the

Scariano law firm successfully rebutted the presumption of shared confidences by proving that the screening procedures were timely employed and fully implemented.

Nevertheless, Ms. Cromley contends that a *per se* rule of disqualification is needed in this case: This court should require the withdrawal both of her former attorney and of the Scariano law firm he joined while representing her. Even if "specific institutional mechanisms" are in place, she insists, they cannot go far enough "to maintain public confidence in the legal profession." *Freeman*, 689 F.2d at 721.

We cannot agree with this contention. In the first place, the presumption of shared confidences has been found to be irrebuttable only when an entire law firm changes sides, *see Analytica*, 708 F.2d at 1267, and not when one attorney changes sides. Moreover, in *Freeman*, this court recognized that, although the court's duty is "to safeguard the sacrosanct privacy of the attorney-client relationship," it must also be recognized that "disqualification, as a prophylactic device for protecting the attorney-client relationship, is a drastic measure which courts should hesitate to impose except when absolutely necessary." *Freeman*, 689 F.2d at 721. Thus, in deciding the appropriate safeguards necessary in the case of attorney disqualification, we must balance the respective interests of the parties and the public. *See Goot*, 894 F.2d at 236. We hold that the measures employed by the Scariano law firm sufficiently screened Ms. Cromley's former counsel from the School Board's present counsel.

Taking another approach, Ms. Cromley also suggests that Mr. Weiner has not avoided "even the appearance of professional impropriety," in contravention of Canons 4 and 9 of the American Bar Association's Code of Professional Responsibility. We are constrained to disagree; we believe that the carefully constructed safeguards do indeed avoid the appearance of impropriety:

> The test has been described by this circuit as embodying the substance of Canon 4 of the A.B.A. Code of Professional Responsibility, which protects the con-

> fidences of a client against disclosure and possible use against him, and of Canon 9, which provides that an attorney must avoid even the appearance of impropriety. Thus, the question before a district court considering a motion for disqualification is "whether it could reasonably be said that during the former representation the attorney might have acquired information related to the subject matter of the subsequent representation."

LaSalle Nat'l Bank, 703 F.2d at 255 (quoting *Cannon v. U.S. Acoustics Corp.*, 398 F. Supp. 209, 223 (N.D. Ill. 1975), *aff'd in part, rev'd in part*, 532 F.2d 1118 (7th Cir. 1976)). Accordingly, our analysis under the three-prong "substantial relationship" test, which has led us to the conclusion that disqualification is not required, likewise causes us to conclude that attorney Weiner has not breached the Code of Professional Ethics in his representation of Ms. Cromley.

The district court, following the three-step test for disqualification of attorneys, found that the barriers erected between the attorney and his new firm were appropriate. The record is devoid of any evidence that Mr. Weiner actually divulged client confidences. Therefore, we conclude that the district court did not err in determining that Scariano's screening process was sufficient to prevent disqualification.

B. *Summary Judgment*

Ms. Cromley's challenge to the summary judgment determination is a narrow one.[4] She states that the defen-

[4] Ms. Cromley asserts that, because the defendants failed to file the depositions in support of their motion for summary judgment, reversal of the summary judgment determination is required under Rule 56 of the Federal Rules of Civil Procedure and Rule 12(m) of the Local General Rules for the United States District Court for the Northern District of Illinois. This position is untenable. It is clear that the local rules of the district afforded Ms. Cromley ample opportunity to submit whatever deposition testimony she believed appropriate. *See* Local General Rule 18.

dants abolished her position as Chair of the Reading Department, and merged the Reading Department into the English Department, only after she made her constitutionally protected complaint about another teacher's sexual misconduct to DCFS. She then contends that the defendants have failed to come forward with evidence that her complaint was not a substantial motivating factor in the abolition of her position.

At the outset, we note that the district court resolved this issue against the backdrop of settled law that a public employee cannot be dismissed for the nondisruptive exercise of his First Amendment right to speak out on "a matter of legitimate public concern." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *Pickering v. Board of Education*, 391 U.S. 563, 571 (1968)). Under the analysis employed in *Connick*, a public employee may be disciplined for speech on a matter of public concern only when the importance of that speech is outweighed by "the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Connick*, 461 U.S. at 150.

When measured against the analytical approach mandated by *Connick*, it is clear that the district court's determination that Ms. Cromley's call to DCFS was protected expression rests on solid ground.[5] First, it is clear that the speech involved a matter of public concern. *Connick* elaborates that "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement." *Id.* at 147-48. Here, the communication on possible child abuse was made by Ms. Cromley in her capacity as an official of the school system to the authorities responsible for protecting children from such harm. Second, we have no quarrel with the district court's determination

[5] The district court addressed this matter in its earlier opinion dealing with the sufficiency of the complaint. *See Cromley*, 699 F. Supp. at 1297.

that the importance of reporting such activities to authorities charged with the responsibility of protecting children outweighs whatever disruptive effect making such a call might have on the school office.

We turn therefore to Ms. Cromley's claim that the defendants have failed to prove that her protected speech, the call to DCFS, was not a substantial or motivating factor in the abolition of her position as Chair of the Reading Department. She bases her claim on the Supreme Court decision *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977).

Ms. Cromley is correct in asserting that *Mount Healthy* provides the proper test to apply when conduct protected by the First Amendment (as defined by *Connick*) is alleged to have played a part in the decision not to rehire a public employee: The test is "one which likewise protects against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights." *Mount Healthy*, 429 U.S. at 287. It is a burden-shifting formula:

> Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor"—or, to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.

Id.; *see Price Waterhouse v. Hopkins*, 490 U.S. 228, 245 (1989) (characterizing the *Mount Healthy* test as a "balance of burdens"). The plaintiff who alleges retaliation for the exercise of his constitutionally protected rights thus has the burden of showing that the protected conduct was a "substantial" or "motivating" factor in the defendant's action. *O'Connor v. Chicago Transit Auth.*,

985 F.2d 1362, 1368 (7th Cir. 1993). If the plaintiff meets this burden, the burden then shifts to the defendant to prove by a preponderance of the evidence that the plaintiff would not have attained the position he sought even without the protected speech considerations. *Garrett v. Barnes*, 961 F.2d 629, 632 (7th Cir. 1992).

Under this test, "the fact that [the plaintiff's] protected speech may precede an adverse employment decision alone does not establish causation under *Mount Healthy*." *O'Connor*, 985 F.2d at 1370. The plaintiff could have been turned down "for a good reason or for no reason at all," as long as it was not because of constitutionally protected activities. *Garrett*, 961 F.2d at 633. The defendant does not have to prove a legitimate reason for taking adverse action against the plaintiff until the plaintiff has come forth with sufficient evidence to support a prima facie case of substantial motivation. *Id.* An employer's presentation of uncontradicted evidence that the department was being reorganized establishes a legitimate reason for not reappointing this plaintiff. *Id.* at 634 (stating that a "re-organization is a legitimate reason to terminate someone who is performing satisfactorily") (citing *Misek v. City of Chicago*, 783 F.2d 98 (7th Cir. 1986)). The plaintiff can, of course, challenge the legitimacy of the reorganization. *Id.*

The district court was of the view that Ms. Cromley failed to produce evidence sufficient to support a finding that the call to DCFS, admittedly protected speech, was a substantial factor in the decision not to renew her administrative position. It was also of the view, expressed as an alternative holding, that, even if the call had been a substantial factor in the decision, it was clear that the decision not to reappoint her would have been made in any event. We believe that the district court was correct in both estimations.

Ms. Cromley contends that the decision to merge these departments was made spontaneously on March 27, 1989, and was not based on any legitimate educational purpose. *See* R.101, ¶¶ 11.03, 11.04 at 8-9 (Plaintiff's Response to

Defendants' Statement of Uncontested Facts). The defendants agree that Ms. Cromley was told of the merger by the principal on March 27, 1989, but explain that the merger had been recommended in 1982, and that discussions had been ongoing at the administrative level since the fall of 1986 and were "probably finalized in early March [1987] regarding curriculum and implementation of the English recommendations." R.95, ¶¶ 11.03, 11.04 at 62 (Defendants' Statement of Uncontested Facts). Even though she disputes these facts, Ms. Cromley does not deny a conversation in 1986 with the assistant principal concerning the administration's reasons for wanting a merger of the two departments.[6] Because these statements by the defendants, including some taken from the plaintiff's own deposition, are uncontested, they must be treated by the court as admitted. *See Schulz v. Serfilco, Ltd.*, 965 F.2d 516, 519 (7th Cir. 1992) (stating that, because plaintiff failed to respond to enumerated Rule 12(m) statements, the facts were deemed admitted by plaintiff under Rule 12(n)). Therefore, Ms. Cromley's claim that the merger decision was made spontaneously after her telephone call to DCFS cannot support an assertion that the call to DCFS was a substantial factor in the decision against reappointment.

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[6] The following facts set forth by the defendants were uncontested by Ms. Cromley in her Response to Defendants' Statement of Uncontested Facts at R.101:

> 11.14 Cromley understood from discussions with Ward that the administration wanted to combine the English and Reading Departments so that students would not be able to go through four years of high school without taking an English course. [CRM Dep. 370-371]
>
> 11.15 This conversation about the possibility of combining English and Reading occurred in the fall of 1986. [CRM Dep. 371]
>
> 11.16 The Union President Fender had heard numerous people talking about the merger of English and Reading and it had been a possibility and a topic of discussion for many years at Lockport High School. [FND Dep. 111]

R.95 at 65.

Moreover, even if the merger of the departments had occurred without earlier discussion with Ms. Cromley and even if we were to construe such thin circumstantial evidence to raise a triable issue as to whether the call to DCFS was a substantial factor in the decision not to reappoint Ms. Cromley, she could not avoid summary judgment on this basis. Ms. Cromley still would not have answered the defendants' contention that the reorganization would have occurred even absent her call to DCFS. As the district court concluded, it was clear that the superintendent, knowing of the broader conflict between Ms. Cromley and Meints, would not have let her remain in a supervisory role over him, even if she had not called DCFS. With respect to the Chapter I Coordinator position, the district court noted that, although this position did not require direct supervision over Meints, it did require that the incumbent work well with the school administration. The district court stated that, by the time this position was filled, Ms. Cromley's working relationship with school officials had deteriorated substantially for reasons that did not hinge on the call to DCFS. This analysis is entirely consistent with the *Connick* Court's position that, "[w]hen close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." *Connick*, 461 U.S. at 151-52.

Because Ms. Cromley did not present evidence, direct or circumstantial, to refute the stated, legitimate reasons for not reappointing her, reversal of the summary judgment is not warranted. Ms. Cromley met her initial burden by alleging adequately that she had exercised her constitutional right of free speech, and that the School Board had retaliated. However, we agree with the district court's conclusion that no reasonable jury could find that Ms. Cromley has met her burden of establishing that her complaint to DCFS was a substantial factor in the decision to merge the two departments. Nor, assuming arguendo that she did meet her burden of demonstrating that the call was a substantial factor, did she show that the decision against reappointment would have been any different.

She could not ignore the defendants' assertions in their Statement of Uncontested Facts that her protected speech was not a substantial factor in the decision and that, even if that speech had been such a factor, the decision of the defendants would have been the same. Ms. Cromley has failed to contest the substantial accuracy of those contentions; therefore, summary judgment was appropriate.[7]

Conclusion

We conclude that the district court did not err in denying Ms. Cromley's motion for disqualification of defendants' attorneys. We also hold that the district court properly granted summary judgment to the defendants. Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[7] *Cf. O'Connor v. Chicago Transit*, 985 F.2d 1362, 1371 (7th Cir. 1993) (affirming the grant of summary judgment in a public employee discharge case in which the record established that the decision-maker was unaware of the employee's whistleblowing activities and the employee had a record of gross insubordination); *Cusson-Cobb v. O'Lessker*, 953 F.2d 1079, 1081 (7th Cir. 1992) (holding that summary judgment was appropriate when the plaintiff alleged that political affiliation was a motivating factor in her discharge; her superior, by affidavit, denied any knowledge of her political affiliation; and plaintiff, in response, did not provide any evidence to rebut that statement).

USCA A07XXXC-92-001—Midwest Law Printing Co., Inc., Chicago—3-3-94

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 93-1300

MARCIA ANN CROMLEY,

Plaintiff-Appellant,

v.

BOARD OF EDUCATION OF LOCKPORT TOWNSHIP HIGH SCHOOL DISTRICT 205, DONALD E. WEBER, RICHARD J. DITTLE, AND DONALD MEINTS,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois
No. 87 C 9767—**James B. Moran,** *Chief Judge.*

[September 9, 1993]

HON. THOMAS E. FAIRCHILD, Circuit Judge
HON. JOHN L. COFFEY, Circuit Judge
HON. KENNETH F. RIPPLE, Circuit Judge

JUDGMENT — WITH ORAL ARGUMENT

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARCELLA ANN CROMLEY,

Plaintiff,

No. 91 C 2686 *v.*

BOARD OF EDUCATION OF LOCKPORT TOWNSHIP HIGH SCHOOL DISTRICT 205, DONALD E. WEBER, RICHARD J. DITTLE, AND DONALD MEINTS,

Defendants.

MEMORANDUM OPINION AND ORDER

Defendants request that this court, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, grant their motion to dismiss plaintiff's complaint. In such circumstances any inference drawn must be favorable to the plaintiff, *United Milk Products Co. v. Michigan Avenue National Bank of Chicago*, 401 F.2d 14, 17 (7th Cir. 1968), and the allegations contained in the complaint are to be accepted as true. *National Van Lines, Inc. v. United States*, 326 F.2d 362, 372 (7th Cir. 1964); 5 Wright, Miller & Cooper, Federal Practice and Procedure §1363 at 656 (1969).

FACTS

Viewing the complaint in the light most favorable to the plaintiff, the facts underlying this dispute appear as follows:

Plaintiff Marcella Ann Cromley (''Cromley'') was employed as a reading instructor by the Board of Education of Lockport Township High School District 205, Will County, Illinois (the ''Board'') from the 1974-75 school year up to and including the 1977-78 academic year, at the District's Central Campus. For the 1978-79 school year the Board selected Cromley to be the Reading Department Chairperson/Chapter 1 Director upon the recommendation of defendant Donald Weber (''Weber''), then principal of the East Campus and now superintendent of District 205. Cromley had been reappointed to this position every year through the 1986-87 school year.

In December 1986 two female students informed Cromley that defendant Donald Meints ("Meints"), a reading teacher employed by the Board at the East Campus, had kissed them and another female student. They also described how Meints on several occasions had rubbed their necks and shoulders in a way that offended them and that he had also made sexually-offensive comments. Cromley considered each of these described incidents unprofessional and sexual harassment. Later that month, Cromley informed the principal of East Campus, defendant Richard J. Dittle ("Dittle"), of the students' complaints. Dittle had the school social worker interview the complaining students, after which he personally interviewed them. The social worker told Dittle that the girls had in fact complained about Meints, and the social worker added that she too had heard complaints from students that Meints rubbed their shoulders in a way they thought sexual and offensive. Dittle confirmed to Cromley that the students had reiterated their complaints to him and added that they told him of Meints' kissing them as he slid his hand down their buttocks.

Dittle discussed the matter with Meints without informing the Illinois Department of Children and Family Services ("DCFS") of the students' complaints or describing the discussion. Dittle also failed to place a report in Meints' personal file. On February 12, 1987, Cromley called the DCFS herself. She reported the facts concerning the allegations of the two students and gave her name. Five days later DCFS representatives came to District 205 to investigate Cromley's complaint but Dittle refused to allow Cromley to speak with them.

On March 4, 1987, Cromley noted the students' allegations in her yearly performance evaluation of Meints executed pursuant to her duties as Reading department chairperson. Meints rebutted Cromley's evaluation in writing ('the rebuttal") and at a meeting on March 16, 1987, distributed it to Dittle, the American Federation of Teachers" ("AFT") president, an AFT grievance committee member, Meints, and Cromley. Around the time of the meeting Meints showed additional representatives of the AFT his rebuttal and informed other teachers of its contents. The rebuttal claimed that Cromley's evaluation was a "malicious, vindictive, vengeful attempt to discredit me both as a person and as an educator," that it was "rife with innuendos, insinuations, fabrications, and half-

truths," and that "Cromley's remarks which, based on hearsay, were taken out of context, contorted, and made 'dirty' by a mind which is consumed with and obsessed with finding all references to women as sexually motivated" (cplt. 15). The rebuttal also stated that, "perhaps I should sympathize with a person who looks at everything in such a jaded, contorted, twisted manner." *Id* Meints also told other teachers that Cromley had made an anonymous telephone call reporting him to the DCFS.

Subsequent to Cromley's telling Dittle that she intended to seek legal advice with respect to the statements being circulated about her, Dittle met with Weber on March 27, 1987. Although Cromley had been previously told that she would be maintained in her current positions, Dittle informed her that, beginning with the 1987-88 school year, the Reading department was being merged into the English Department and, as a result, the position of Reading Department chairperson was being eliminated.

Cromley's yearly evaluations from 1982-83 through 1985-86 described her work as "exemplary," "excellent," "effective," "very good job," "on top of her field," and recommended her for reappointment for each subsequent year (cplt. 19). Cromley's 1986-87 evaluation noted problems with personnel in the Reading Department but contained no remarks with respect to reappointment.

In April 1987 Cromley applied for the position of Gifted Coordinator and Chapter 1 Coordinator, in response to the posted notice of the opening. On May 1 she was told that the position was awarded to Steven Midlock, an individual whom Cromley alleges "was not as qualified for the position" as herself (cplt. 122). Weber recommended Midlock to the Board for the position of Chapter 1 coordinator, but the appointment failed because of a tie vote. Thus, on May 21 the position was reposted, and Cromley and Midlock both reapplied.

The same day on which Cromley reapplied, May 26, she asked Weber for a written account for the reasons why she was not reappointed as Chapter 1 Director for the 1987-88 academic year. Weber responded the next day with a writing which included, among other comments, that "[a]t no time were your qualifications for this position viewed in a negative fashion; as a matter of fact,

quite to the contrary, your past commitment to this program and completion of the tasks at hand have been thorough and supported by Chapter 1 review team evaluations'' (cplt. 28). During the summer of 1987 Midlock accepted employment in another school district. Other than Cromley, Midlock was the only applicant for the Chapter 1 Coordinator position. In early July the Board posted the position of English Department Chairperson, without mentioning the Chapter 1 Coordinator vacancy.

Cromley wrote a ''Response to March 16, 1987, response'') dated July 15, 1987. Cromley attached exhibits and requested that the administration place a copy in Meints' personnel file. Dittle refused this request.

On July 15, 1987, notice was posted for the position of Associate English Department Chairperson. Cromley subsequently filed an application for the position in which she argued that the responsibilities of the Chapter 1 Coordinator would blend well with those of the Associate English Department Chairperson. Though Cromley was the only applicant from within District 205, she was notified on August 12 that another person was recommended for the associate chairperson position. On August 18 the Board, on Weber's recommendation, hired Carol Garrett as an English teacher an appointed her Associate English Department Chairperson. Garrett was previously not a teacher in District 205 and Cromley alleges that ''Garrett was not as qualified as herself (cplt. 40).

A special meeting of the Board, held on July 25, appointed Sandra Martin English Department chairperson and Chapter 1 Coordinator. Cromley contends that Martin ''was not as qualified for the Chapter 1 position'' as herself (cplt. 37) and also that Martin has not timely applied for the position pursuant to the May 1987 posting.

Cromley brought suit alleging, *inter alia*, that Weber, Dittle, and the Board of Education knew or reasonably should have known that their actions and conduct in (1) eliminating the Reading Department; and/or (2) not reappointing Cromley to the Chapter 1 Director position; and/or (3) not recommending Cromley for the then vacant Chapter 1 Director position; and/or (4) not recommending Cromley for the Associate English Department Chairperson position, violated Cromley's First and Fourteenth Amendment

freedoms. Plaintiff alleges causes an action pursuant to 42 U.S.C. §1983 against the Board, against Weber and Dittle individually and in their respective official capacities, and against Meints. She also alleges that Weber and Dittle conspired together to bring about these same ends. Cromley submits pendent state claims for defamation, retaliatory action, intentional interference with contractual relations and intentional infliction of emotional distress.

DISCUSSION

I. Section 1983 Claims

Plaintiff's counts I through III state claims under the First and Fourteenth Amendments to the U.S. Constitution and thereby under 42 U.S.C. §1983. Section 1983 prohibits persons acting under color of state law from depriving any person of any rights, privileges or immunities secured by the Constitution or federal law. Thus plaintiff must have pled both that there were the requisite actions under color of state law and that she was thereby denied a protected right.

Plaintiff apparently seeks damages in count I from th Board/County; in counts II and III she alleges the liability of particular individuals (the former concerning Dittle, the latter, Weber);[1] and in count IV the conspiracy charge is detailed.

A. Deprivation of a Protected Right — Cromley's Speech

To state her claim under §1983 plaintiff must allege that defendants retaliated against her on the basis of protected speech. That public employees do not relinquish their First Amendment rights as a condition of employment is beyond dispute. Equally clear is that

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1. Defendants are correct that "[a]s to Count 1, Plaintiff's allegations are vague and confusing" (def. mem. at 2). The problem is that count I includes each and every background fact of concern. Both this court and defendants have had to ascertain count I's scope via the context surrounding counts II and III.

in order to create an environment conductive to educating students, certain restrictions on the speech of public school teachers are necessary. What is therefore required is "a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern, and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education,* 391 U.S. 563, 568 (1968). The fear that post-hoc judicial evaluation might effectively prevent school boards from acting on internal matters wholly irrelevant to speech led the Supreme Court in *Mt. Healthy\/1City Board of Education v. Doyle,* 429 U.S. 274 (1977), to create a test which protects both teachers and school boards. *Mt. Healthy* holds that the plaintiff-teacher must demonstrate that his or her conduct was protected by both the First and Fourteenth Amendments, and also that such conduct played a substantial part in the decision not to rehire. *Id* at 285-86. Once that demonstration is made the burden shifts to the board to demonstrate by a preponderance of the evidence that it would have reached the same decision even in the absence of the "protected conduct." *Id* at 285-87. We employ the same test here where the plaintiff alleges not that she was fired but rather that she was victimized by other forms of retaliation.

The first Amendment protects speech that addresses issues of "public concern," as opposed to matters of (1982). Protected speech includes employee expression which can "be fairly considered as relating to any matter of political, social, or other concern to the community." *Id* at 146.

Plaintiff here alleged sufficient facts to bring her speech within the ambit of First Amendment protection. Cromley informed Dittle about student complaints, reported them to the DCFS.[2] and

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2. Whether the Abused and Neglected Child Reporting Act ("ANCRA"), ch. 23, §2051 *et seq.* then compelled reporting to the DCFS is irrelevant to whether or not Cromley's speech is constitutionally protected. To suggest otherwise would place the legislature, who decides when reporting is legally required, in control of the First Amendment's scope.

reiterated them in her yearly performance evaluation of Meints.[3] Allegations that Meints had taken sexual liberties with his students are of obvious concern to the community of Lockport. *See, e.g., Kufalk v. Hart*, 610 F.Supp. 1178, 1183 (N.D. Ill. 1985) (holding plaintiff's oral criticism of defendants' "application and interpretation of regulations concerning the prevention of abuse" of disabled clients to be of public concern and therefore constitutionally protected).

Defendants also allege that the *Pickering* balancing tests renders Cromley's speech unprotected because Dittle had a "compelling interest in beginning to restore the working relationships and in resuming regular operations" (defendants' motion in support of motion to dismiss (hereafter "def. mem.") at 4). Whether the state's interest herein outweighs Cromley's interest in speaking on a matter of public concern is impossible to evaluate at this time. As previously mentioned, this court's inquiry does not go beyond the scope of the plaintiff's complaint wherein plaintiff alleges that the elimination of the reading department and her not being recommended for and/or appointed to other positions, were *solely* in retaliation for her exercise of constitutional and statutory rights. Furthermore, defendants recite no workplace efficiency justifications for the alleged retaliation (merging the departments and denying her subsequent applications) which might serve to explain the aforementioned actions and perhaps outweigh Cromley's speech interests.[4] Defendants merely justify Dittle's

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3. Private communications are also afforded constitutional protection. *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979).

4. For example, in *Connick* the Court upheld the employee's dismissal:

> Connick's judgment, and apparently also that of his first assistant Dennis Waldron, who characterized Myers' actions as causing a "mini-insurrection," was that Myer's questionnaire was an act of insubordination which interfered with working relationships. When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the

concluding his investigation in a way unsatisfactory to Cromley. They do not address the crux of Cromley's claim — that not only was no disciplinary action taken against Meints, but also that Cromley herself was the subject of retaliation.

The second relevant issue is whether the defendants' conduct was a "substantial factor" in precipitating plaintiff's damages. The first *Mt. Healthy* inquiry, ascertaining whether the plaintiff's speech was protected, is answered affirmatively above. And with regard to the second inquiry, plaintiff also sufficiently alleges that protected conduct was a substantial factor in the actions by the Board, Dittle and Weber which led to her damages. For example, at 43 the complaint avers:

> *Because of* the aforesaid protected conduct and actions of Cromley, the Board of Education, upon the recommendations of Dittle, eliminated the Reading Department, thus eliminated the position Cromley held as Reading Department Chairperson. Weber and Dittle refused and/or failed to recommend to the Board of Education that Cromley be reappointed as Chapter 1 Director and/or appointed as Associate English Department Chairperson, and the Board of Education did not reappoint or appoint Cromley to said positions, *all in retaliation for* for her exercise of and in violation of the aforesaid constitutional an statutory rights.

(Emphasis added.) Thus, the second inquiry is satisfied and plaintiff has thus pled allegations sufficient to meet *her* burden under *Mt. Healthy*. The remainder of the test — that the defendants must demonstrate that their actions would have been taken nonetheless — is irrelevant to defendant's Rule 12(b)(6) motion.[5]

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employer's judgment is appropriate.
461 U.S. at 151-52.

5. Nothing in this opinion should be taken to suggest that this court foresees that the defendants will not be able to meet this burden. The conclusion here is merely that the complaint survives the scrutiny appropriate to a motion to dismiss.

B. Color of State Law

To state a claim under §1983 plaintiff must allege that the defendants acted under "color of state law." This court finds plaintiff's allegations sufficient. Almost by definition the Board of Education acted under color of state law. And, with regard to Dittle and Weber "the plaintiff describes each defendant and his official position. This is sufficient to support the inference in a motion to dismiss that defendants acted under color of state law." *Marshall v. Sprangler,* 397 F.Supp. 200, 202 (W.D. Va. 1975).

C. Board/County Liability

The Supreme Court's decision in *Monell v. Department of Social Services of the City of New York,* 436 U.S. 658 (1978), held that a local municipal body may be held liable for its own constitutional violations under 42 U.S.C. §1983 and may not be sued under a theory of *respondeat superior.* Under this standard local municipal bodies may be sued "for constitutional deprivations visited pursuant to governmental 'custom.'" *Id.* at 690-91. And such policies or customs need not be reduced to writing:

> Congress included customs and usages [in §1983] because of the persistent and widespread discriminatory practices of state officials .... Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a "custom of usage" with the force of law.

Adickes v. S.H. Kress & Co., 398 U.S. 144, 167-68 (1970), *quoted in Monell,* 436 U.S. at 691.

Even given the liberal boundaries of notice pleading in the context of a motion to dismiss, "a section 1983 plaintiff must do more than merely parrot the language of *Monell* or copy conclusory language from assorted decisions of other courts in which *Monell*-type claims have been upheld." *Hamrick v. Lewis,* 515 F.Supp. 983, 986 (N.D. Ill. 1981). To satisfy this pleading obligation, plaintiff contends that where the *defendant is a decision-making body* a single decision may be sufficient under *Monell.*[6]

The Supreme Court's decision in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), held that, in some circumstances, municipal liability may be imposed for a single decision. The Court therein evaluated the basis for *Monell*:

> to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible. *Monell* reasoned that recovery from a municipality is limited to acts that are, properly speaking, acts of the municipality'' —that is acts which the municipality has officially sanctioned or ordered. With this understanding, it is plain that municipal liability may be imposed for a single decision by municipal policy-makers under appropriate circumstances.
> ****
> If the decision to adopt that particular course of action is properly made by that government's authorized decision makers, it surely represents an act of official government ''policy'' as that term is commonly understood. More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly. To deny compensation to he victim would therefore be contrary to the fundamental purpose of §1983.

Id. at 479-81. Thus, as the policymaking body to whom Lockport delegated authority as to educational staffing questions, the board of education is liable not on a *respondeat superior* theory but because of their unique position.[7] JSee *Kingsville Independent*

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6. Plaintiff also contends that the alleged *multiple decisions* made by the Board which operated to damage Cromley are sufficient to establish a policy or custom under *Monell*. The court need not reach this issue given its holding that the Board's position as ultimate decision maker with regard to the decisions affecting Cromley suffices under *Monell*.

7. Clarification was provided in *Pembaur's* footnote 12:

> Thus, for example, the County Sheriff may have discretion to hire and fire employees without also being

School District v. Cooper, 611 F.2d 9 (5th Cir. 1980) (holding school district liable for the actions of its board in firing a teacher because the only way the district could act was through its board of trustees); *see also Stoddard v. School District*, 590 F.2d 829 (10th Cir. 1979) (holding school district liable for the actions of its board in failing to renew a teacher's contract because the district had acted through its board of trustees).[8] Thus, assuming as correct the complaint's allegations that the Board retaliated against Cromley for exercising her constitutionally-protected rights (cplt. par. 43), *Monell* would not bar relief. Because the school board is the official policy-maker, liability is not precluded.

D. Individual Capacity Liability

Defendants Weber and Dittle contend that there is insufficient nexus between their actions and Cromley's damages because they did not have the requisite ability to discharge[9] or appoint employees. Yet this court is duty bound to hold the individual defendants

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> the county official responsible for establishing county employment policy. If this were the case, the Sheriff's decisions respecting employment would not give rise to municipal liability, although similar decisions with respect to law enforcement practices, over which the Sheriff *is* the official policymaker, *would* give rise to municipal liability.

475 U.S. at 483 (emphasis in original). The actions which Cromley alleges to have been retaliatory, eliminating the Reading Department and denying her subsequent applications, clearly are decisions of the Board.

8. Because the defendant at issue is the Lockport Board of Education itself and not the school district, the justification for liability is even more compelling.

9. Defendants presumably intend "discharge" to include control over the elimination of departments with the consequent "discharging" of the former chairpersons.

liable for their own actions. Both Dittle and Weber are alleged to have intentionally made retaliatory recommendations which effectively operated to Cromley's detriment (cplt. 47(e), 48(e)).[10] Such allegations are more than sufficient to meet the bad faith standard of *Hutto v. Finney*, 437 U.S. 678, 700 (1978). The extent to which these actions contributed to the plaintiff's alleged damages is a question of fact inappropriate for determination at this time. Were plaintiff's allegations proven correct — that but for Weber and Dittle's retaliation her damages would have been avoided — she would be entitled to relief. Thus, as a matter of law, plaintiff alleges claims against both Weber and Dittle, individually, upon which relief can be granted.

E. Official Capacity Liability

The action against Weber and Dittle in their official capacities is another way of alleging school district liability. The complaint makes it plain, however, that the school board was the decision-maker. If it, encouraged by Weber and Dittle retaliated against plaintiff, then the school district is liable. If it did not retaliate but was, rather, misled by Weber and Dittle, then the school district would not be liable although Weber and Dittle may personally be answerable for a constitutional tort. The suit against Weber and Dittle in their official capacities adds nothing in those circumstances. Cromley's claim against them in their official capacities is dismissed.

F. Conspiracy

In order to establish a *prima facie* case of conspiracy plaintiff must allege an agreement by two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means. This court need not address the sufficiency of plaintiff's allegations as to whether an agreement existed, nor need it evaluate

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10. Counts II and III both have paragraphs numbered 45-48. The textually cited paragraph numbers correspond to those actually in the complaint.

whether defendants committed the requisite overt act. Instead, this court holds that the conspiracy allegations fall within the intracorporate conspiracy doctrine articulated in *Dombrowski v. Dowling*, 459 F.2d 190 Cir. 1972).

In *Dombrowski*, Judge now Justice Stevens applied antitrust's intracorporate conspiracy doctrine to §1985 civil rights actions:

> that "two or more persons ...conspire or go in disguise on the highway," is not satisfied by proof that a discriminatory business decision reflects the collective judgment of two or more executives of the same firm.
> single act of discrimination by a single business entity, the fact that two or more agents participated in the decision or in the act itself will normally not constitute the conspiracy contemplated by [§1985(3)].

Id. at 196. Because this court finds the Seventh Circuit's intracorporate conspiracy doctrine equally applicable to the individual defendants at bar, and the school board, we answer negatively the question left open in *Cohen v. Illlinois Institute of Technology*, 524 F.2d 818, 830 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (19) ("we do not reach the issue whether a determination of policy by an institute and its executives can be a 'conspiracy' within the meaning of [§1985 (3)]"), as it relates to conspiracies to violate §1983.

Weber and Dittle's ability to injure Cromley deprived solely from their positions within the school district and the influence they wielded therefrom. They had no ability, as individuals, to affect Cromley's employment position. Thus, within the meaning of *Dombrowski*, as pronounced and defined by the Seventh Circuit,[11] plaintiff's proper causes of action have already been alleged in counts I through III; the conspiracy count would "appear to add

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11. This court cannot, as plaintiff urges, reject the Seventh Circuit's longstanding application of the intracorporate conspiracy doctrine beyond its antitrust origins.

nothing in terms of defendant's liability." *Walker v. Woodward Governor Co.*, 631 F.Supp. 91, 95 (N.D. Ill. 1986).

Invoking *Stathos v. Bowden*, 728 F.2d 15 (1st Cir. 1984), plaintiff contends that the numerous acts committed in furtherance of the alleged conspiracy render the intracorporate conspiracy doctrine inapplicable. Yet, as long as merely one entity is involved this court fails to see how multiplication creates addition — how the frequency with which the plaintiff's rights were allegedly violated can impact on the conspiracy issue. We cannot resolve this "conceptual difficulty." *Coley v. M & M Mars, Inc.*, 461 F.Supp. 1073, 1077 (M.D. Ga. 1978); *see also Weaver v. Gross, 605 F.Supp. 210, 214-215 (D.D.C. 1985). Count IV is therefore dismissed.*

G. Damages

1. Injury to Reputation

Defendants concede that injury to reputation is compensable where constitutional rights are deprived. Because the plaintiff adequately alleges that defendants retaliated against her exercise of First Amendment freedoms, her claim for injury to reputation cannot be dismissed at this time.

2. Mandamus

Plaintiff's allegation that the Reading department was eliminated in retaliation for her constitutionally-protected speech is insufficient justification for plaintiff's plea for mandamus. Plaintiff urges, without citation, that reinstatement via mandamus is appropriate where individuals allege retaliation for exercising their First Amendment rights. Courts have held backpay to be an insufficient remedy because it does not rectify the chilling effect created by retaliation. *See, e.g., Banks v. Burkich*, 788 F.2d 1161, 1164 (6th Cir. 1986) ("The prospect of money damages will not be sufficient for many employees to overcome the otherwise chilling effect that accompanies the threat of termination"). But courts have more general equitable powers with which to address the problem: we can order reinstatement without the use of mandamus. *See, e.g., Reeves v. Claiborne County Bd. of Educ.*, 828 F.2d 1096 (5th Cir. 1987); *see also Banks v. Burkich, supra.* Thus

mandamus would be inappropriate here.

3. Qualified Immunity

Harlow v. Fitzgerald, 457 U.S. 800 (1981) sets out the criteria by which to determine whether particular conduct of officials is shielded by immunity. Such immunity is available to individual defendants "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id* at 818. In the case at bar plaintiff has sufficiently alleged that the individual defendants — Dittle and Weber — acted in "reckless or callous disregard of, or indifference to, said [constitutional] rights," and that they "knew or reasonably should have known" that their retaliatory actions violated Cromley's First Amendment freedoms (cplt. at 44, 47, 48.)[12] Whether the Abused and Neglected Child Reporting Act's scope reached school personnel is irrelevant. Plaintiff's constitutionally-protected speech consisted of informing Dittle about student complaints, reporting them to the DCFS and reiterating them in Meints' yearly performance evaluation. *See supra* I.A. and accompanying notes. No one disputes defendants' contentions that they "are entitled to exercise their discretion in hiring, within the bounds of Illinois and contract law" (Def. Mem. at 9-10). We would merely add that this discretion is also subject to the constraints imposed by the federal Constitution and statutory law. Because plaintiff's contentions are sufficient to meet the *Harlow* standard, dismissal on the basis of qualified immunity is inappropriate.

4. Punitive Damages

The defendants contend, without further explanation, that the Board is immune from punitive damages under §1983. Suffice it to say, this is a drastic oversimplification of a very complex part of §1983 litigation. The assertion is correct insofar as it applies

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12. To reiterate, counts II and III both have paragraphs numbered 45-48 and the textually cited paragraph numbers correspond to those actually used in the complaint.

exclusively to the punitive damages claim against the Board itself. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981).[13] With regard to Weber and Dittle, in their individual capacities, punitive damages are available if their conduct resulted from "reckless or callous disregard for the plaintiff's rights, as well [as from] intentional violations of federal law". *Smith v. Wade*, 461 U.S. 30, 51 (1983). The plaintiff has pled reckless disregard of and indifference to her First Amendment rights, and therefore her allegations are sufficient to avoid Rule 12(b)(6) dismissal of the punitive damages claim; the issue can, of course, be revisited after discovery on a motion for summary judgment. *See, e.g., Kufalk v. Hart*, 610 F.Supp. 1178, 1191 (N.D. Ill. 1985).[14]

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13. As is explained *infra* at note 15, the Board's freedom from punitive damage claims described in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), applies only to *direct* actions against the Board and not to litigation arising out of the Board's indemnification of officials.

14. The Seventh Circuit's *Kolar* opinion isn't as succinct as defendants implicitly suggest, nor as sweeping as plaintiff contends. In *Kolar* the court permitted a plaintiff in a §1983 action to recover punitive damages from the county. After noting the general rule that "local public entities are immune from punitive damage awards in civil rights actions," the court held that the Illinois Local Government and Governmental Employees Tort Immunity Act ("the Tort Immunity Act"), Ill.Rev.Stat. ch. 85, 9-102 (1983), waived the county's common law immunity from the $100 punitive damage claim awarded plaintiff Kolar. Cromley asserts that *Kolar* stands for the proposition that "the Board's immunity from liability for punitive damages was waived by state law then Illinois enacted the Local Government and Governmental Employees Tort Immunity Act") (pl. mem. in oppos. to def. mo to dis. at 17-18). We find that conclusion misleading. *Kolar* decided only that the Tort Immunity Act waived the county's exposure as an indemnitor, leaving intact the common law immunity from punitive damages articulated in *City of Newport*, in actions brought directly against local public entities. *See also Bell v. City of Milwaukee*, 746 F.2d 1205, 1271 (7th Cir. 1984)

II. PENDENT CLAIMS

A. Libel and Slander[15]

The complaint sets out three allegedly libelous passages or remarks for which plaintiff seeks damages. The first two of these are contained in Meints' rebuttal to Cromley's evaluation; one portrays the evaluation as a personal assault which the other attacks Cromley's personality as being preoccupied with sexual innuendoes. The complaint also contends that Meints and Dittle defamed Cromley by telling others that her call to the DCFS was made anonymously. Cromley contends that these passages and remarks, because they allegedly impute an inability or lack of integrity in the discharge of her employment duties and injure her in her profession as a teacher and administrator, fall within he categories of libel and slander *per se*. She also alleges what amounts to special damages — that as a result of the alleged defamatory statements

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(holding that the well-established policy of municipal immunity from punitive damages precluded plaintiffs from recovering punitive damages absent indemnification, but rejecting the contention that such immunity precluded indemnification of the punitive damages awarded against the individual defendants). Thus defendants are correct insofar as *Kolar* supports their contention that the defendant board is absolutely immune from punitive damages. The holding does not, however, impact on the exposure of the individuals. Nor does this immunity preclude Board indemnification.

15. For the sake of simplicity, this court uses "libel" to refer to both its traditional meaning as well as that previously associated with "slander" because "Illinois law no longer recognizes any substantive differences between the two causes of action." *American Pet Motels, Inc. v. Chicago Veterinary Medical Association*, 106 Ill. App. 3d 626, 629 n.1, 435 N.E.2d 1297, 1300 n.1, 62 Ill.Dec.325, 328 n.1 (1st Dist. 1982). We also use "defamation" to impart the same meaning.

she lost and/or didn't receive various positions.[16]

Words are libelous *per se* if they are "so obviously and naturally hurtful to the person aggrieved that proof of their injurious character can be dispensed with." *See, e.g. Quilici v. Second Amendment Foundation*, 769 F.2d 414, 417-18 (7th Cir. 1985), *cert denied*, 475 U.S. 1013 (1986). Two of the four categories of words which constitute libel *per se* under Illinois law are alleged in this case. Cromley alleges that Meints, words both "impute an inability to perform, or want of integrity in the discharge of duties of an office or employment" and also prejudice her in "her profession or trade." *See, e.g., Quilici*, 769 F.2d at 417 (citations omitted).

The first allegedly defamatory remark from Meints is contained in the initial paragraph of his rebuttal to Cromley's evaluation:

> I feel it necessary to take this opportunity to offer a rebuttal to the evaluation of my teaching which was completed by Ms. Cromley on March 3, 1987; a document that I can only view as a malicious, vindictive, vengeful attempt to discredit me both as a person and as an educator. The observation and evaluation report is rife with innuendos, insinuations, fabrications, and half-truths which certainly serve no good purpose.

(Cplt. exh. B at 1). Initially, these comments consist merely of Meints' opinions as to the nature of Cromley's initial evaluation.[17] Taken as a whole, this passage reflects Meints' opinion as to both

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16. Cromley alleges that "[a]s a result of Meints and Dittle's defamatory statements, Cromley has suffered the loss of her position of Associate English Department Chairperson, other injury to and loss of reputation in her profession, and severe emotional distress" (cplt. at 59).

17. The sole example of a factual misrepresentation is plaintiff's claim that Meints and Dittle stated her phone call was made anonymously (pls. mem. at 29).

the content of the evaluation as well as his explanation of why it was written as it was. While Meints' comments are hardly ambiguous, they are not "capable of objective verification" — the average person would not infer that they had a "factual context" — and the broader context of the whole rebuttal "signals that the statement" is opinion. *See Ollman v. Evans*, 750 F.2d 970, 979 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985); *see also Stevens v. Tillman*, 661 F.Supp. 702, 708 (N.D. Ill. 1986).[18] Such opinions are constitutionally protected: "However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1973). Additional speech, *e.g.*, Cromley's response to Meints' rebuttal, would therefore seem to be the appropriate remedy.[19] As a matter of law,

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18. Plaintiff invokes Stewart v. Chicago Title Insurance Co., 151 Ill.App.3d 888, 503 N.E.2d 580, 104 Ill.Dec. 865 (4th Dist. 1987), for the proposition that expressions of opinion can nonetheless be actionable where "it implies the allegation of undisclosed defamatory facts and the basis for the opinion." *Id.* at 15 Ill.App.3d at 891, 503 N.E.2d at 582, 104 Ill.Dec. at 867, *quoting* the Restatement (second) of Tots §566 (1977). But this court fails to see how Meints' opinion could be interpreted as being informed by undisclosed facts uniquely within his knowledge. Further, the detailed nature of the rebuttal, that for five pages Meints rebuts each allegation contained in Cromley's initial evaluation, strongly suggests that he has held nothing back.

19. In fact, Cromley's response of July 15 directly confronts Meints' allegations:

> The use of emotional, pejorative terms, "malicious, vindictive, vengeful," as a preface to your "rebuttal" reflects your feelings about my character but provides no explanation, either explicit or implicit, as to *WHY* I would allegedly endeavor to "discredit" you as a person or educator. Your introductory paragraph establishes the climate for the remainder of the rebuttal — an angry assault upon my character and an assault upon my evaluation, which you characterize as "rife with

therefore, this passage is beyond the reach of libel law. *See Ollman*, 750 F.2d at 979. Moreover, these remarks do not suggest that Cromley is incapable of effectively executing her duties as an evaluater of her coteachers; Meints maintains that this particular document was an "attempt to discredit me both as a person and as an educator." "Although harsh and uncomplimentary, these words amount to criticism of the plaintiff's conduct in a particular instance and not a personal attack on the plaintiff's honesty or character in general." *Britton v. Winfield Public Library*, 101 Ill.App.3d 546, 549, 428 N.E.2d 650, 652, 57 Ill.Dec. 100, 102 (2d Dist. 1981). Thus an action for libel *per se* cannot be maintained on these remarks.

The second allegedly defamatory remark from Meints is contained in the seventh paragraph of his rebuttal:

> Ms. Cromley's remarks about "unprofessional sexual comments" are remarks which, based on hearsay, were taken out of context, contorted, and made "dirty" by a mind which is consumed with and obsessed with finding all references to women as sexually motivated.

(Cplt. exh. B at 2.) While these comment seem much closer to crossing the line, we nonetheless hold them not libelous. When taken as a whole, Meints' rebuttal attempts to refute Cromley's allegations with respect to his teaching. The above passage is Meints' attempt to explain why Cromley could be so incorrect in her evaluation. Thus, taken in context of the whole rebuttal, these comments are more opinion and thus not actionable. Furthermore, it is far from clear that Meints' comments *obviously and naturally* harm Cromley in her profession or impute an inability perform or lack of integrity in discharging the duties of her job. As a

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> innuendoes, [sic], and half-truths." In fact, I find nothing substantive in your rebuttal as to why my factual observations were incorrect.

(Cplt. exh. D at 1 (emphasis in original).)

department chairperson, Cromley evaluates the teaching abilities of her subordinates. This court can, with a bit of imagination, contemplate situations in which Cromley's alleged "dirty" mind might create an inability to perform her work well. Her ability to evaluate fairly male teachers might for example, be called into question. But the standard is strict: the harm contemplated must obviously and naturally result. This not being the situation at bar, plaintiff's libel *per se* claim cannot survive defendant's motion to dismiss.

The third allegedly defamatory remark was purportedly uttered by both Meints and Dittle. Cromley alleges that "Meints told other teachers that Cromley made an anonymous telephone call reporting him to DCFS" (cplt. 16) and that "Dittle made statements to various administrators and teachers that Cromley made an anonymous telephone call to DCFS concerning Meints" (*id.* at 53). Plaintiff claims not only that both Dittle and Meints knew she had given her name, but also that the allegations of anonymity were "false and slanderous, imputing an inability or lack of integrity by Cromley in the discharge of her employment duties and injuring Cromley in her position as a teacher and administrator" (*id.* at 54). For the purpose of ascertaining whether these comments were libelous *per se*, Cromley's interpretation of these accounts is irrelevant. The operative legal question is whether the comments are "so obviously and naturally hurtful to the person aggrieved that proof of their injurious character can be dispensed with." *Quilici*, 769 F.2d at 417-18. Mischaracterizing as anonymous the reporting of another teacher to the DCFS cannot possible meet this standard. That the plaintiff herself views "anonymous calls to anyone as contemptible behavior" (cplt. exh. C at 9) is irrelevant. Thus, this last remark, like the two passages of Meints' rebuttal discussed above, cannot be characterized as libel *per se*.

Finally, this court doubts that it has jurisdiction to decide whether plaintiff's claim that she suffered damages as a result of Meints' and Dittle's defamatory statements sufficiently alleges special damages to constitute a cause of action for libel *per quod*. Jurisdiction of this court is premised on her §1983 allegations — that in retaliation for her exercising constitutionally-protected rights she suffered damages. She cannot simultaneously maintain and seek to prove, for the purposes of her pendent libel claim, that these

identical damages were instead caused by the libelous remarks of Meints and Dittle and not by a constitutional tort. Because Cromley cannot maintain an action for libel *per se*, and because, in the absence of persuasive authority to the contrary, this court believes *per quod* cause of action, count V[20] is dismissed.

B. Retaliatory Action

In *Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 384 N.E.2d 353, 23 Ill.Dec.359 (Ill. 1978), the Supreme Court of Illinois joined the growing number of states which have recognized the tort of retaliatory discharge. The court in *Kelsay* found that the public policy furthered by the workers' compensation system would be frustrated if employees could be fired for filing worker's compensation claims. The court concluded that "we are convinced that to uphold and implement this public policy a cause of action should exist for retaliatory discharge." 74 Ill.2d at 181, 384 N.E.2d at 357, 23 Ill.Dec. at 563.[21]

The contours of "public policy" were explored in *Palmateer v. International Harvester Co.*, 85 Ill.2d 124, 421 N.E.2d 876, 52 Ill.Dec. 13 (Ill. 1981). *Palmateer* dealt with plaintiff's allegations that he was discharged for supplying information that a Harvester employee might be violating the criminal Code to a local law enforcement agency, for agreeing to gather further evidence implicating the employee, and for intending to testify at the resulting trial. The court conceded that "[n]o specific constitutional or statutory provision requires a citizen to take an active part in the ferreting out and prosecution of crime," but nonetheless held that "public policy nevertheless favors citizen crime-fighters." 85 Ill.

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20. As a plaintiff has failed to make out a jurisdictionally acceptable cause of action, there is no need for this court to examine the various immunity issues.

21. Similar concerns are raised where retaliation short of discharge serves to frustrate public policy. Consequently, we find the retaliatory discharge case law applicable to the instant allegation.

2d at 132, 421 N.E.2d at 880, 52 Ill.ec. at 17. The Supreme Court of Illinois thus reversed Harvester's motion to dismiss and the case was returned to the Circuit court for further proceedings.

Defendants allege that, prior to January 1, 1987, the Abused and Neglected Child Reporting Act ("ANCRA") pertained only to alleged abuse by persons in a child's living environment. They therefore claim that plaintiff states no valid public policy basis for her actions. We disagree with defendant's interpretation of the pre-1987 scope of the Act. While P.A. 84-1318, approved September 3, 1986 and effective on January 1, 1987, explicitly inserted "education personnel" among the group of persons responsible for the child's welfare whose abuse or neglect would require reporting, the conclusion that such individuals were not covered by the Act prior to the amendments is far from clear. P.A. 84-1318 removed a catchall provision —"any other person responsible for the child's care at the time of the alleged abuse or neglect" — and instead inserted a particularized list:

> within a public or private profit or not for profit child care facility; or any other person responsible for the child's welfare at the time of the alleged abuse or neglect, including but not limited to health care professionals, *educational personnel*, recreational supervisors, and volunteers or support personnel in any setting where children may be subject to abuse or neglect.

1986 Ill.Laws 2764, Ill.Rev.Stat. ch. 23, 2053 (emphasis added). Thus, it seems as if Cromley was required by ANCRA, both before and after amendment, to report Meints' alleged abuse; she would seem to fall within the general provision as well as within the particularized list. Furthermore, since 1980 the Illinois School Code has threatened a one-year suspension of one's teaching certificate for "willful failure to report an instance of suspected child abuse or neglect as required by the 'Abused and Neglect Child Reporting Act,' as now or hereafter amended." 1984 Ill. Laws 2028, Ill.Rev.Stat. ch. 23 2054. At a minimum, this provision, which was fully operative at the time of Cromley's actions, suggests that the reporting of alleged child abuse furthered public policy. As a tool for interpreting whether Cromley was *compelled* to report the children's allegations, this provision can only be

construed to suggest that teachers were required to report alleged child abuse under threat of losing their teaching certificates long before the 1986 amendments.

This court has little difficulty in characterizing Cromley's actions as in furtherance of public policy. The mere existence of the ANCRA at the time of Cromley's actions demonstrates the importance which society has placed on the reporting of child abuse. Like the plaintiff in *Palmateer* who supplied evidence to the authorities and agreed to continue to aid in the investigation and prosecution though not legally compelled to do so, Cromley's efforts furthered the enforcement of child abuse laws.

The issue is not resolved, however, once we conclude that public policy is furthered by reports under the ANCRA. Defendants allege rather curtly that the Northern District of Illinois has concluded that plaintiffs with potential §1983 claims are not allowed to simultaneously pursue retaliatory claims. No matter how unpersuasively presented, we evaluate the relevant doctrine.

Going back to the origins of the state law cause of action, courts have held that "the Illinois Supreme Court seems willing to recognize the tort of retaliatory discharge when to do so would further the policy goals stated in *Kelsay*." *Busa v. Barnes*, 646 F.Supp. 615, 617 n.4 (N.D. Ill. 1986) (citations omitted). Plaintiff suggests that because her state claim is founded on an Illinois statute it furthers different goals than the §1983 actions. But this focus misses the *raison d'etre* for the retaliatory cause of action. *Kelsay* and its progeny are concerned with affording relief to otherwise remediless plaintiffs. The court in *Kelsay* feared that the workmen's compensation scheme would be undermined were employers permitted to threaten the termination of those employees who sought compensation: "We cannot ignore the fact that when faced with such a dilemma many employees, whose common law rights would have been supplanted by the Act, would choose to retain their jobs, and thus, in effect, would be left without a remedy either common law or statutory." 74 Ill.2d at 182, 384 N.E.2d at 357, 23 Ill.Dec. at 563. *Busa* dismissed plaintiff's state retaliatory discharge claim because the "§1983 claim will provide vindication of the policies behind the First Amendment and Article 1, §§4 and 5 of the Illinois Constitution." 646 F.Supp. at 618.

And *Gutierrez v. City of Chicago*, 605 F.Supp. 973 (N.D. Ill. 1985), the court dismissed the retaliatory discharge claim because "[b]oth Title VII and 42 U.S.C. §1983 provide causes of action for wrongful discharge based on political activity or on racial discrimination." *Id.* at 980.

These cases are not determinative, however, for it is very possible that the state law claim might further either different policy goals than those furthered by the §1983 claim or the same goals to an even greater degree.[22] This, and not the basis for each claim, is the controlling issue.

We hold that §1983 appears sufficient to vindicate plaintiff's rights. It can be argued that the ANCRA's concern is with child abuse and the First Amendment with free speech. In the case at bar, however, enforcement of the latter ensures successful protection of the former.[23] This court has already held that plaintiff's

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22. The state law claim might, for example, permit punitive damages where the federal claim does not. *See, e.g., Midgett v. Sackett-Chicago, Inc.*, 105 Ill.2d 143 N.E.2d 1280, 85 Ill.Dec. 475 (Ill. 1985). By raising the penalty the state law claim may permit a unique remedy without which, according to state law, plaintiff's recovery would be considered incomplete. *See Midgett*, 105 Ill.2d at 149, 473 N.E.2d at 1284, 85 Ill.Dec. at 479 ("[i]f there is no possibility that an employer can be liable in punitive damages, not only has the employee been afforded an incomplete remedy, but there is no available sanction against a violator of an important public policy of this state").

23. Plaintiff is correct that *Brudnicki v. General Electric Company*, 535 F.Supp. 84 (N.D. Ill. 1982) is not controlling. The *Brudnicki* court argued that the remedies established under the federal — 42 U.S.C. §200e-3 (1976) — were exclusive. Thus the court refused to "imply an independent [state] cause of action in this context." *Id.* at 89. Because §1983 claims are not statutorily prescribed to be exclusive, the *Brudnicki* case is not binding. Nonetheless, the case is instructive to see how the court looked beyond the plaintiff's characterization of the policies allegedly furthered by the federal and state actions. The court instead concluded that "[p]laintiff's argument

reports pursuant to the ANCRA are protected speech under the First and Fourteenth Amendments. Thus, such actions — which are necessary to further the public policies behind the ANCRA — are already protected as speech, and suppression thereof is enforceable under §1983. We therefore dismiss the plaintiff's retaliatory discharge claim contained in count VI and need not reach the issue as to whether mandamus would be appropriate relief.

C. Intentional Interference with Contract and Employment Relations

Illinois law clearly describes the essential elements for an action alleging the tort of intentional interference with contractual relations. They are the existence of a valid and enforceable contract between the plaintiff and another, defendants' awareness of the contract, defendants' intentional and unjustified inducement of a breach of that contract, a subsequent breach of the contract by the third party caused by the defendants' action, and damages. *See e.g. Richmond v. Hahn*, 134 Ill.App.3d 947, 948, 481 N.E.2d 943, 944, 90 Ill. Dec. 143, 144 (3rd Dist. 1985).

Even after viewing the complaint "liberally with a view to doing substantial justice between the parties," *id.*, this court is at a loss in its attempt to locate the requisite contract between the plaintiff and another. There obviously was no contract with regard to the positions for which Cromley applied. And we find nothing in the complaint to suggest that the Board was in breach of a contract with respect to the Reading Department position. Plaintiff's allegation that the "Board of Education reappointed Cromley to said position every year thereafter through the 1986-87 school year"

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advances a distinction without a difference. ... The theoretical policy against being compelled to violate these laws is subsumed by the underlying policy against employment discrimination. If plaintiff were permitted to maintain an independent tort on such dependent grounds, the remedies provided by state and federal law would have no meaning." *Id.*

(cplt. 18), strongly suggests that her position as chairman was evaluated annually. No matter how strongly Cromley felt that she deserved the subsequent appointment, she had no contractual right to it. Also irrelevant is that she expected reappointment, even where this expectation would be considered reasonable. Count VII alleges interference with contractual relations, not expectations, and thus must be dismissed. If the present complaint omits relevant facts to the existence of a contract for the position of chairman, we invite the plaintiff to amend.

Further, this and many other courts have explored what amounts to a corporate officer exception to the tort of intentional interference with contractual relations. *See, e.g. Allen Saltzman Associates, Inc. v. Aileen, Inc.*, 633 F.Supp. 1161, 1163 (N.D. Ill. 1986); *Medina v. Spotn, Inc.*, 591 F.Supp. 190, 196 (N.D. Ill. 1984). "Corporate officers are not outsiders intermeddling maliciously in the business affairs of the corporation. They are privileged to act on behalf of their corporations, using their business judgment and discretion." *George A. Fuller Co. v. Chicago College of Osteopathic Medicine*, 719 F.2d 1326, 1333 (7th Cir. 1983). These same considerations of deference in the context of agency law are applicable in the case at bar. Here the superintendent of the district and the principal of Central Campus are alleged to have interfered with a contract (*see above*) between the Board and the plaintiff. But the superintendent and the principal are the academic reflection of corporate officers and are therefore privileged to act on behalf of the Board.

The limits to the exception are similarly derived from agency law:[24] "[W]hen the action is detrimental to the corporation and

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24 Plaintiff uses the language of *Ramsey v. Greenwald*, 91 Ill.App.3d 855, 414 N.E.2d 1266, 47 Ill.Dec. 150 (2nd Dist. 1980), to contend that the defendant was not acting on behalf of the principal because "he did not have the power to hire or fire" the plaintiff. *Id.* at 91 Ill. App.3d at 863, 414 N.E.2d at 1272, 47 Ill.Dec. at 156. In the very next line, however, the court conceded that "the submission of reports regarding Ramsey's performance may have been a task that was within the scope of his employment." *Id.* Thus, the filing of reports

outside the scope of corporate authority, immunity ceases to exist.'' *George A. Fuller*, 719 F. 2d at 1333. The considerations relevant to the inquiry are as follows:

> Illinois law requires — to state a cause of action against corporate officers for interfering with their corporate principal's contract — the allegation of facts which, if true, establish that the officers induced the breach to further their personal goals, or to injure the other party to the contract, *and* acted contrary to the best interest of the corporation.
>
> *Id.; Medina*, 591 F.Supp. at 196 (emphasis in original).

Plaintiff has sufficiently alleged that Dittle and Weber acted to injure Cromley, but she has not alleged facts which suggest that their actions were contrary to the best interests of the Board. Nor has she alleged that the actions benefited Dittle or Weber personally. Remembering that the only conceivable claim as to the existence of a contract would be an allegation that there was a contract between Cromley and the Board pertaining to her chairmanship of the Reading Department, the plaintiff has failed to demonstrate either that merging the Reading department into the English Department was detrimental to education or that it benefited Dittle and Weber personally.[25] In the absence of those allegations they

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by Weber and Dittle and their making recommendations were on behalf of the school board. Though the court in *Ramsey* eventually held that the defendant was not acting with the best interests of the principal in mind, we hold *infra* that the plaintiff herein has not alleged facts sufficient to make a comparable demonstration.

25. It is important to remember that Cromley does not allege wrongful discharge from employment. That distinguishes this case from Kufalk v. Hart, 610 F.Supp. 1178, 1192 (N.D. Ill. 1985), wherein the court was willing to infer that the dismissal of the plaintiff was contrary to the interests of the school. *Id* at 1192 (''From the duration of this tenure alone, this court can infer the plaintiff was a valuable asset to his employer''). We are unable to make the same inference with regard to the more

were legally incapable of interfering with whatever contract could be alleged to have existed between the Board and Cromley.

D. Intentional Infliction of Emotional Distress

To state a cause of action for the tort of intentional infliction of emotional distress, plaintiff must allege facts which demonstrate that (1) defendants' conduct was extreme and outrageous; (2) plaintiff's emotional distress was severe; and (3) defendants' conduct was such that they knew that severe emotional distress would be certain or substantially certain to result. *See, e.g., Smith v. Metropolitan Life Insurance Company*, 550 F.Supp. 896, 901 (N.D. Ill. 1982). Defendants herein contend both that plaintiff has not alleged facts suggesting that their conduct was extreme or outrageous, and also that plaintiff similarly has failed to allege that defendants knew their conduct would create emotional distress.

Paragraphs 70 and 71 of the complaint sufficiently state the requisite allegations as to the nature of the defendants' conduct and their knowledge:

> 70. The actions and conduct of Weber Dittle, Meints, and the Board of Education were extreme and outrageous, were intentionally calculated to and did inflict emotional distress upon Cromley, and resulted in Cromley's need to seek medical attention. 71. Weber, Dittle, Meints, and the Board of Education knew that their actions and conduct with respect to Cromley were extreme and outrageous and would inflict emotional distress upon Cromley.

Prior to discovery, this court is reluctant to resolve the conflicting allegations as to the nature of defendants' conduct and knowledge. We take the allegations contained in 70 and 71 to be true and thus hold that the elements of the intentional infliction of emotional distress claims are sufficiently alleged.

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general policy decisions of the school board, for example, whether it was beneficial to consolidate two departments.

Defendants further contend that there must be an allegation that a physical injury or illness was suffered. In support of this proposition they cite *Goldberg By and Through Goldberg v. Ruskin*, 128 Ill.App.3d 1029, 471 N.E.2d 530, 84 Ill.Dec. 1 (1st Dist. 1984), *aff'd* 113 Ill.2d 482, 499 N.E.2d 406, 101 Ill.Dec 818 (Ill. 1986), a case which considered the tort of *negligent* infliction of emotional distress. With respect to the *intentional* infliction tort there is considerable authority to the contrary. *See e.g., McCaskill v. Barr*, 92 Ill.App.3d 157, 159, 414 N.E.2d 1327, 1328, 47 Ill.Dec. 211, 212 (4th Dist. 1980) (''Illinois, unlike some other jurisdictions, does not require physical injury or disability to accompany, or result from the psychic trauma''). Furthermore, the plaintiff has alleged that the actions of the defendants'' did inflict emotional distress upon Cromley, and resulted in Cromley's need to seek medical attention'' (cplt. at 70). For Rule 12(b)(6) purposes, this court finds this allegation sufficient to constitute the requisite physical injury. If defendants are correct that ''[p]laintiff's feeble attempt to obfuscate the true facts must fail'' (def. mem. at 21), it will wilt in the light of discovery as well.

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss is granted with respect to counts I-III (§1983), as applied to Weber and Dittle's liability in their official capacities; count IV (conspiracy); count V (defamation); count VI (retaliatory action); and count VII (intentional interference with contract). Defendants' motion is denied with respect to counts I-III (§1983), as applied to the Board of Education, Meints, and Weber and Dittle in their individual capacities, and count VIII (intentional infliction of emotional distress).

DATED: November 1, 1988

ENTER: /s/ James B. Moran

Judge, United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARCELLA ANN CROMLEY,

Plaintiff,

No. 91 C 2686

v.

BOARD OF EDUCATION OF LOCKPORT TOWNSHIP HIGH SCHOOL DISTRICT 205, DONALD E. WEBER, RICHARD J. DITTLE, AND DONALD MEINTS,

Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiff's prior attorney has accepted a partnership with defendant's attorneys. Plaintiff wants to disqualify defendant's attorneys, and we deny the motion.

There can be no dispute about there being a substantial relationship, that the attorney in fact obtained confidences in his prior firm and that there is a presumption he will share those confidences with his new partners. The only issue is whether the barriers erected between the attorney and his new law firm with respect to this case are sufficient to rebut the presumption of shared confidences. We believe that appropriate isolation will rebut the presumption not only in governmental transfers but in private transfers as well, and we believe the barriers to be appropriate here.

DATED: March 19, 1990

ENTER: /s/ James B. Moran
Judge, United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARCELLA ANN CROMLEY,

Plaintiff,

No. 91 C 2686 *v.*

BOARD OF EDUCATION OF LOCKPORT TOWNSHIP HIGH SCHOOL DISTRICT 205, DONALD E. WEBER, RICHARD J. DITTLE, AND DONALD MEINTS,

Defendants.

MEMORANDUM OPINION AND ORDER

The basis dispute in this case is described in an earlier opinion, *Cromley v. Board of Education of Lockport Township High School District 205*, 699 F. Supp. 1283 (N.D. Ill. 1988). We there denied, in certain respects, a motion to dismiss. Now the motion is defendants' motion for summary judgment, and that we grant.

The facts we recite are not much different from those set forth in the earlier opinion. Although the parties do not dispute the objective facts, they do, however, have sharply differing perceptions of what those facts mean. Moreover, the substantial discovery since the earlier opinion has provided considerable content to the nature of the dispute. What is involved is not a lot in the economic sense. A teacher, who continues to be a teacher, was not reappointed to an unpaid position as Chapter I Coordinator or Director. She also lost her position as Chairperson of the Reading department, a position that paid her approximately $1400 additional compensation each year. Both positions also provided some release time from normal teaching responsibilities. The dispute has triggered a major legal confrontation. The lawyering has been both competent and considerable -- the earlier opinion was 18 pages, the discovery thereafter was extensive, and the motion papers now before the court include approximately 100 pages devoted to separating out the contested and uncontested facts, and almost 100 pages of briefs.

We start off with the question of whether or not a trier of fact could reasonably conclude that plaintiff's professional career was blighted from 1987 on because she exercised her First Amendment rights. We think the best way to answer that question is by a chronological account of what happened.

Plaintiff has been a teacher in the system since 1974. From 1978 to 1987 she was Reading Department chairperson and Chapter I Coordinator, both supervisory or quasi-administrative positions. Her evaluations were always exemplary, at least up to the time involved here. Defendant Donald Meints has been a teacher in the system for over 30 years, and at least for a period of many years was also a teacher in the reading Department. Plaintiff, from 1978 on, was his supervisor and, as such, evaluated his performance. The relationship between plaintiff and Meints had, over the years, occasionally been troubled. On occasion their differences had led to union intercession to resolve matters, and Meints had several times accused plaintiff of trying to harm him professionally.

In 1986 and 1987 defendant Donald E. Weber was superintendent at District 205, defendant Richard J. Dittle was principal of the high school, defendant Chris Ward was an assistant superintendent at the high school, and Ronald Smith was the other assistant superintendent. The period was marked by turmoil and conflict between the administration and the Board, and within the Board. There was also, in plaintiff's view, some friction in the last half of 1986 between herself and Dittle, and herself and Weber, in that she believed Dittle had harassed her about a couple of matters and Weber had threatened not to renew her Chapter I Coordinator position because of differences between them respecting the relocation of the Chapter I office.

On December 10, 1986, plaintiff advised Dittle that two female students had reported that Meints had kissed them and another female student, that on several occasions he had rubbed their necks and shoulders in a way that had offended them, and that he had on several occasions made sexually offensive comments. There was, apparently, also a reference to his hand being on one student's buttocks. (Plaintiff reported another incident also, but that report was much later, well after the critical events here.) Dittle had a female

social worker interview the students and he also interviewed them himself. He then discussed the matter with Meints and with other administrators. Weber learned of the matter from the assistant superintendents and he advised the Board about it. According to Dittle, Meints did not recall ever having his hand on a student's buttocks; according to Meints he denied that part of it.

Otherwise, the reports were largely consistent: Meints had hugged and kissed a female student on the cheek in class while sharing a happy circumstance. A decision was made that Dittle and Smith should talk to Meints about the inappropriateness of his behavior, which they did on December 12, 1986. A written summary of that meeting was placed in a District file but not not in Meints' personnel file. The latter was reported to the Board, but not to the Department of Children and Family Services (DCFS), as it was not believed to be warranted. Dittle told plaintiff what had been done. That, for the moment, ended it.

On February 12, 1987, plaintiff reported the matter to DCFS. She did not tell the administration she had done so, but a trier of fact could reasonably conclude that plaintiff's supervisors were convinced that the report came from her. A DCFS investigator visited the school one or two days later and talked to Dittle, Meints and the union president, Fender. The investigator returned on February 17, 1987, to talk to plaintiff, but she was in class. He left his card, and plaintiff was given the card the following day and told the investigator had requested her to call. The investigator had, upon leaving, indicated a 95 per cent chance that the charges were unfounded. There is no indication plaintiff called the investigator. The February 17, 1987 visit, and Weber's report to the Board of the visit, apparently ended the matter again.

On March 4, 1987, plaintiff submitted her annual evaluation of Meints. It was a very negative evaluation. Plaintiff referred explicitly to "sexual comments" by Meints and "reports of certain liberties you have taken with students which they reported as sexually offensive." She accused him of punishing those students because they reported. Plaintiff also took sharp issue with Meints' grading standards and requested that he submit an explanation of why each student who received a "D" or "F" for the first semester had received such a low grade, and that he keep her updated, on

a weekly basis, on students in that category.

Dittle also evaluated Meints, his evaluation on March 24, 1987, being far more favorable. It did caution Meints "on employing any type of feedback that might involve a method or manner which might send mixed signals to students." Meints was also heard from. He submitted a long and intemperate rebuttal at a meeting with Dittle, the union president, a union grievance committee member and the plainiff on March 25, 1987. Interestingly enough, he was exercised about plaintiff's criticism of his use of the film "My Bodyguard" as a teaching device, claiming that she had said it was inappropriate for reasons of "vulgarity, violence, gambling, and sex." Plaintiff had mentioned its use in her evaluation, but without criticism, although she later indicated that Meints had endorsed materials "with questionable content and language ...." Meints was the only teacher who ever submitted rebuttals.

The merger of the Reading Department into the English Department apparently had been discussed from time to time since 1982, when there was a North Central recommendation to that effect. Weber and Ward testified that the matter was actively pursued in the fall of 1986, the primary reason being that students opting for reading courses could go through four years of high school without ever taking an English course. The union president, Fender, and plaintiff, were both aware that merger was being considered. Plaintiff has testified that she was told by Dittle on March 27, 1987, that the Reading department would continue unchanged for the next school year and then was told, several hours later, after Dittle met with Weber, of the intended merger. There appears to be no dispute, however, that the intended merger was announced that day and that it was Weber's decision as superintendent, not a matter considered or decided by the Board.

That merger eliminated the need for a reading department chairperson but not the need for a Chapter I Coordinator. The yearly posting of that position occurred April 7, 1987. Both plaintiff and Meints applied. Plaintiff was interviewed on May 1, 1987. During that interview, some considerable portion of her time was devoted by plaintiff to explaining why Meints should not be selected. Neither was selected.

There was one final chapter in the Cromley-Meints controversy. On July 15, 1987, plaintiff submitted an 11- page response to Meints' March rebuttal and requested that it be placed in Meints' personnel file. While less intemperate than the rebuttal, it was harshly critical. It referred again, and in detail, to the reports of female students, said he had lied about his credentials, and described his conduct as reflecting "blatant insubordination" and "extreme hostility." It was the only time an evaluator had ever submitted a reply. Fender, Weber and Dittle agreed that inclusion in Meints' personnel file would probably violate the collective bargaining contract and denied that request. It was placed in another District file.

That same date the position of associate English Department chairperson was posted. Plaintiff applied. She was told on August 12, 1987, that she had not been selected. In 1989 she applied for the joint positions of English Department chairperson and Chapter I Coordinator. She was not selected.

Potential Liability of Donald Meints

Cromley concedes that none of her federal claims applies to Meints. Because pendent party jurisdiction was not permitted when this case was filed, all state law claims against Meints must be dismissed. *Finley v. United States*, 490 U.S. 545 (1989); *Kreuzfeld A.G. v Carnehammer*, 138 F.R.D. 594, 608 (S.D. Fla. 1991) (explaining that the Judicial Improvements Act of 1990, which amended 28 U.S.C. §1367 to permit pendent party jurisdiction, may not be applied retroactively).

Potential Liability of the Board of Education

Cromley also concedes that she has a claim against the Board of Education only if she has an official capacity claim against Weber for merging the Reading department and the English Department, and thereby eliminating her position as English Department chairperson. There is no evidence that the Board ever considered or even discussed Cromley's speech about Meints. It can be liable only because it is the juridical entity answerable for a *Monell* claim based upon the final policy decision of Weber to merge the two departments. We therefore turn to the potential liability of Weber and of the other two individual defendants, Dittle

and Ward.

Potential Liability of Weber, Dittle and Ward

The legal framework for analyzing these issues is well established but not conductive to simple application. A public employee does not forfeit his or her First Amendment rights, but their exercise is subject to some limitations. We must determine whether the speech pertains to matters of public concern. If it does, we must determine whether or not the employee's right as a citizen to speak out on matters of public concern outweighs the government's interest in promoting effective and efficient public service. That means we must consider any needs to maintain discipline or harmony among co-workers, to curtail conduct that impedes employees' proper and competent performance and to foster close and personal relationships where appropriate. The speech is protected speech if he interest in speaking out on matters of public concern outweighs the governmental interests. That determination, with its consequent balancing of interests, is a legal issue. If the speech is protected speech, it must then be determined whether or not that speech was a substantial and motivating cause for any personnel decision adversely affecting the employee, a fact question. If it was such a cause, it must be determined whether or not that adverse decision would have been made in any event, also a fact question. *Oshe v. Hughes*, 816 F.2d 1144 (7th Cir. 1987), *judgment vacated on other grounds*, 485 U.S. 902 (1988); *Greenberg v. Kmetko*, 840 F.2d 467 (7th Cir. 1988); *Knapp v. Whitaker*, 757 F.2d 827 (7th Cir. 1985), *cert. denied*, 474 U.S. 803 (1985).

Plaintiff contends, and defendants do not dispute, that her call to DCFS on February 12, 1987 related to a matter of public concern and that it was protected speech. That agreement does not extend to plaintiff's March 4, 1987 evaluation on Meints. Private communications, as we stated in the earlier opinion, are also afforded constitutional protection -- not only public speech is protected. That the statements were made in an internal evaluation does not necessarily mean that they have ceased to relate to a matter of public concern.

We believe, however, that the evaluation here was not protected speech. the administration was informed by the initial report. DCFS was informed by the subsequent call. Neither the

administration nor DCFS thought, after investigation, that action was required beyond that then taken. That action was an oral reprimand, and Cromley understood that was to be the end of the matter. Plaintiff's supervisors surely could consider, in reviewing her supervisory capabilities, the repetition, in a harsh evaluation to the same audience, of a claim that the administration had considered closed, especially where that matter concerned a teacher the plaintiff would continue to evaluate and supervise. The plaintiffs's willingness to accept considered decisions, harmony with coworkers, and the impact upon continuing relationships, are all implicated in plaintiff's persistence in raising the issue again.

This case turns, then, on whether or not there is sufficient evidence for a trier of fact reasonably to conclude that plaintiff's call to DCFS was a substantial and motivating cause of the merger and plaintiff's subsequent failures to attain leadership positions, and that there would have been no merger and no passing over of plaintiff but for that call. And we do not believe there is sufficient evidence to support either of those conclusions.

This case is not about a gadfly whose speaking-out has little or no impact upon her own performance. No one disputes that plaintiff is an experienced, dedicated, and excellent classroom teacher. But no action was taken against her as a teacher. The positions she was denied are supervisory or quasi-administrative leadership positions. Defendants contend that the merger decision was independent of the Cromley-Meints confrontation, that after the merger it was intended that the Chapter I Coordinator and English Department Chairperson positions be held by the same person, and that the persons ultimately selected for those positions were qualified. That all may be so, but we cannot conclude that with certainly upon the present record. It may well be that the confrontation may have provided the final impetus for the decision to merge, and defendants concede, as they must, that plaintiff's role in the confrontation was a substantial factor in the subsequent denial of leadership positions.

But that does not necessarily lead to liability. Had the prior organizational structure remained unchanged, plaintiff would have continued to supervise and evaluate Meints. As Ward said at one point, someone had to leave. The administration had concluded

that major discipline for Meints was not warranted. Certainly it did not believe it had grounds, legally or equitably, to dismiss from his position a teacher with over 30 years service and covered by a collective bargaining contract. Cromley recognizes that the conflict poisoned her relationship with other teachers, that the union representatives were distressed by her role in the matter, and that Weber complained about the teaching staff's preoccupation with the conflict. By the time the merger decision was announced, the continuing dispute had led to the Meints rebuttal and the union grievance meeting. Something had to give, whether or not plaintiff's call to DCFS was part of the mix of circumstances. And those circumstances have not changed. Both plaintiff and Meints remain in the same department. If she were in a leadership position in that department, she undoubtedly would have to supervise and evaluate Meints. We do not believe that a trier of fact could reasonably conclude that but for the single call to DCFS, the merger decision would not have been made or that plaintiff would have been selected ad English Department Chairperson or associate chairperson.

The Chapter I Coordinator position is a somewhat different matter. It did not require any supervision or evaluation of Meints. Defendants say that it was intended to combine that position with the chairperson's position, but it was posted separately and plaintiff was granted a lengthy interview. By then, however, there was more water over the dam. As we have noted, plaintiff's relationship with both Dittle and Weber had deteriorated over the previous year; it had been a tumultuous year for the District; both plaintiff and Meints applied; Meints had submitted his intemperate rebuttal; and plaintiff used the interview as an opportunity to renew her criticisms of Meints. The conclusion was then reached, according to defendants, that neither Meints nor plaintiff should be in leadership positions. Plaintiff cannot directly refute that conclusion. But can we reasonably infer that the DCFS call was the final, or a final straw that led to that conclusion? We think not. Plaintiff places a greater burden upon that one event than it can sustain.

We grant summary judgment to Weber, Dittle and Ward on plaintiff's federal claims. Accordingly, we grant summary judgment to the Board. We dismiss plaintiff's claims against Meints. And, because plaintiff's state claims for tortious interference with

prospective economic advantage requires intentional infliction of emotional distress, a determination that the individual administrative defendants act wrongfully, a determination the record cannot support, we grant summary judgment on those claims as well, without ever getting to the issue of qualified privilege.

DATED: January 5, 1933

ENTER: /s/ James B. Moran
Judge, United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARCELLA ANN CROMLEY,

Plaintiff,

No. 91 C 2686 *v.*

BOARD OF EDUCATION OF LOCKPORT TOWNSHIP HIGH SCHOOL DISTRICT 205, DONALD E. WEBER, RICHARD J. DITTLE, AND DONALD MEINTS,

Defendants.

AFFIDAVIT OF DAVID P. KULA

I, DAVID P. KULA, being first duly sworn on oath, state that I have personal knowledge of the following facts, except where indicated "upon information and belief," and that if called as a witness in this case could and would competently testify to those facts under my personal knowledge and observation as follows:

1. I am the attorney representing the corporate and individual Defendants, COURT OF EDUCATION OF LOCKPORT TOWNSHIP HIGH SCHOOL DISTRICT 205, DONALD E. WEBER, ROCHARD J. DITTLE, AND DONALD MEINTS.

2. Since the filing of the subject matter on November 12, 1987, I have been the only attorney in the firm of Scariano, Kula, Ellch, and Himes, P.C. to perform any substantive duties with respect to this file with one exception. An associate in my law form, Deborah W. Owens, performed some substantive work on this matter in the researching and drafting of a motion to dismiss and supporting legal memorandum in early to mid 1988. Ms. Owens is no longer with the law form of Scariano, Kula, Ellch, and Himes, having left the firm in March of 1989. No other associate or partner currently with the firm has performed any substantive matter relating to the instant litigation.

3. During the calendar year of 1989, from approximately early February of 1989 up to and including the middle of

September 1989, myself, as counsel for all Defendants, and the law firm of Schwartz and Freeman undertook discovery. Documents were produced, interrogatories were propounded and depositions were conducted by counsel for the Plaintiff at the time, Lawrence Jay Weiner, with the last deposition of the Defendants occurring on September 19, 1989. After September 19, 1989, there has been no substantive matter handled by your affiant relating to this lawsuit up until instant date, save attendance at several status hearings before this court, and the instant response to the motion to disqualify.

4. In early to mid October of 1989 my partner, Anthony G. Scariano, informed me that he was discussing with Weiner the possibility of Weiner joining the law firm of Scariano, Kula, Ellch and Himes.

5. Immediately upon being informed to that effect by Scariano, I called Weiner and, in a conversation with Weiner, he and I both agreed that absolutely nothing of a substantive nature regarding the instant lawsuit would occur until such time as both clients were made aware of the discussions, and further, if at all, until such time as any decisions would be made regarding Weiner's joining the Scariano, Kula, Ellch and Himes law firm. Upon information and belief, Weiner then told Cromley in mid October of 1989 that there was a possibility that he would join the Scariano, Kula, Ellch and Himes firm.

6. Immediately after talking with Weiner in early October, I informed my clients as to the possibility of Weiner joining my firm and further informed my clients that absolutely nothing would be occurring on this lawsuit until such time as final decisions had been made and even then, only if the results of those decisions allowed continued representation by one party of the other to continue. As early as this first conversation in early October 1989, I was informed by my client, an administrator of the Board of Education, that they would be concerned about the possibility of our having to withdraw as attorneys in the firm and further informed us that they would not like that to happen.

7. On November 20, 1989, at a status call before this Court, Weiner's oral motion to withdraw as counsel for Cromley was granted. At that status call I orally informed the Court of my client's desire that we continue as attorneys, and further informed the Court, in response to questions from the Court, that we would further research "China Wall" requirements and that those would be implemented; but I further acknowledged to the Court that, notwithstanding my clients' desire that we continue in the case, it would be the decision of the Court as to our further representation in this matter.

8. In regard to the specific assertions in the Eagle Affidavit, at paragraph 13 of her affidavit that

> "However, Weiner told me that the Scariano firm would not withdraw because the Defendant Board of Education had not previously been a client of the Scariano firm and had specifically chosen the Scariano firm to represent it in this litigation, and that the Scariano firm hoped to represent the Board of Education for other purposes."

the undersigned cannot personally testify as to what Weiner told Eagle. However, the reason for my failure and refusal to withdraw as attorney for the Defendants in this case is because of their specific direction to me to *not* withdraw. Whether or not my firm continues to represent Lockport High School District 205 in other, unrelated matters has no bearing on our decision not to withdraw on this case. Purely and simply, it is my client's desire that we continue to represent all Defendants, and our belief that this can be done under the existing state of the law and Canons of Ethics regarding these issues, that allows us to continue in this matter and to defendant against the instant Motion to Disqualify.

9. As to Eagle's contentions in her Affidavit at paragraphs 14 and 15 that at no time did Kula, Weiner or any member of the Scariano firm advise her that any precautions were being taken to screen Weiner, I refer to my earlier conversation before this Court and Weiner personally on November 29, 1989 when I assured the Court that screening efforts would

be researched and implemented. Furthermore, in response to Eagle's "personally relaying" concerns to me telling me that she would file a motion to disqualify if we did not withdraw, I informed Eagler, *in general* terms, without giving specifics, that prevailing authority acknowledged screening procedures and China Wall mechanisms and that these procedures and mechanisms would be easy to implement given the way that our office is set up. She simply did not agree. Furthermore, upon information and belief, my partner, Anthony G. Scariano, had a conversation with a partner in the Schwartz and Freeman firm, sometime in early January. In this conversation, between Anthony G. Scariano, and Mr. Kenneth Denberg, which conversation centered on Mr. Denberg's efforts to convince Scariano that this firm should withdraw, Scariano informed Denberg, again without specifics, that screen measures relating to Weiner's presence in our firm had been undertaken.

10. Since December 15, 1989 when Weiner joined the firm, he has been officed almost exclusively at our firm's Chicago office at 200 North LaSalle Street. I am officed almost exclusively in our Chicago Heights office at 1450 Aberdeen. Since December 15, 1989, I personally have been to our Chicago office on only three or four occasions. Since December 15, 1989, Weiner has been to the Chicago Heights office on one three occasions, and on each occasion for a specific purpose. On two occasions Weiner was in Chicago Heights to attend a partners' meeting, and on another occasion he was in Chicago Heights to meet with a client. In all three of these occasions he was not in the office for the full day.

11. All of the files and material pertaining to the Cromley matter are not maintained in the common client files of our office, but are rather maintained in the closet in my office in Chicago Heights where I keep files that I, and I alone, work on. Effectively immediately on the 15th of December 1989 screening procedures were implemented pursuant to the attached memorandum (Exhibit A), which was read and signed by all employees of the firm, whether attorney, secretary or support staff (see Exhibit B attached hereto of the list of all employees who have received and executed this

screening memo). All of the admonitions of the screening memo have been adhered to by all attorneys and all support staff employed by this firm. Other than two brief conversations between myself and Weiner of a completely nonsubstantive nature, i.e., whether or not new counsel was obtained for the Plaintiff to substitute for Weiner, and rebarding the *fact* of the filing of the instant motion to disqualify, there has been no discussions whatsoever by any attorney or support staff employed by this firm and Weiner concerning any issue regarding this lawsuit.

Further affiavit sayeth not.

/s/ David P. Kula

SUBSCRIBED and SWORN to before me
this 21st day of February, 1990

/s/Melissa B. Minvau
Notary Public

EXHIBIT A

MEMORANDUM

TO:	ALL ATTORNEYS and SECRETARIES
FROM:	DPK
DATE:	12-15-89
RE:	Cromley v. Board of Education, School District 205 Will County

As you know, effective Lawre Weiner becomes affiliated with our law firm. As may of you also know, Lawre has previously represented the plaintiff in the subject litigation against a client school district of ours, Lockport Township School District 205 in Will County, Illinois. On November 29, 1989, Judge Moran granted Lawre's motion to withdraw as counsel for the plaintiff.

Our client in this matter, the Board of Education of District 205, desires that our firm continue to represent it in regard to this matter. For this circumstances to even to be appropriate, let alone permissible, it is absolutely necessary and critical that certain fundamental principles dictated by the code of conduct and standards of ethics in practice as stated specifically by the Illinois Code of Professional Responsibility, and/or by the federal and state cases interpreting both the Code of Responsibility, and federal law regarding disqualification of counsel, be adhered to by each and every attorney in this firm, both partner and associate, as well as by the support staff of this firm.

Therefore, you are each expected to adhere to the following procedures, without exception, and to sign a copy of this memorandum as evidence of receiving and reading this memorandum and return the signed copy to me as evidence of same.

1. Inasmuch as Lawre will be officed in our Chicago office at 200 North LaSalle Street, any and all documents, records, motions, pleadings, correspondence, mail, from any source whatsoever which might be delivered to, served upon, faxed, or in any way communicated to the Chicago office at 200 North LaSalle Street must be immediately sealed and delivered to the Chicago Heights office to my attention upon a determination that said material is related in any way to the Cromley matter.

2. Furthermore, any and all files, pleadings, memorandum, etc., pertaining to the subject matter will be maintained exclusively in the Chicago Heights office, in *my* office, in my closet filing cabinet. Absolutely no one may have access to any office file relating to the Cromley matter without personal clearance and supervision from me.

3. Inasmuch as all of the work done on this file has been handled out of the Chicago heights office by me, there should be absolutely no reason for any detail whatsoever regarding this case to be discussed by support personnel or attorneys in the Chicago Office and all attorneys in the Chicago are admonished to that effect. Under no circumstances whatsoever is Lawre to be talked to, consulted concerning, or contacted in any way by any attorney or support personnel in this firm

regarding any issue or topic relating to the captioned matter. Accordingly Lawre is hereby admonished that he not discuss any detail whatsoever relating to this suit with any employees of this firm and that he not seek to have or obtain, access to any document, record or file whatsoever maintained by this firm which related to the captioned matter.

Should any attorney or support personnel participate in, facilitate, or seek any communication whatsoever between Lawre and any member, associate, or support personnel of this firm, or should Lawre himself seek to do same, such a circumstances could lead to consideration of discipline by the executive committee. Should anyone have any question, doubts or confusion at all concerning the directives contained in this memo, please contact me immediately.

/s/David P. Kula

I hereby acknowledge having received and read this memo concerning *Cromley v. Board of Education of Lockport Township District 205.* I also hereby acknowledge that I will maintain the original of this document for my own files and records.

/s/David P. Kula